بِسۡمِ اللّٰهِ الرَّحۡمٰنِ الرَّحِيۡمِ

فَلَوۡلَا نَفَرَ مِنۡ كُلِّ فِرۡقَةٍ مِّنۡهُمۡ طَآٮِٕفَةٌ لِّيَتَفَقَّهُوۡا فِى الدِّيۡنِ وَلِيُنۡذِرُوۡا قَوۡمَهُمۡ اِذَا رَجَعُوۡۤا اِلَيۡهِمۡ لَعَلَّهُمۡ يَحۡذَرُوۡنَ ۝١٢٢

Why doesn’t a group from every section of them (Muslims) goes forth, to acquire Fiqh (perfect understanding of the Faith), and then to warn their people upon return to them, so that they may take due care (of the rules of Shari'at). (The Holy Quran 9:122).

Compendium Of Islamic Laws

A Section-Wise Compilation of the Rules of Shari'at relating to Muslim Personal Law

Under the Supervision of

All India Muslim Personal Law Board

Brief Table of Contents

Translated into English from the original Urdu version

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Preface

This Compendium of Islamic Laws, containing a section-wise compilation of the rules of Shari'at falling into the domain of the Muslim personal law, has been prepared for and on behalf of the All India Muslim Personal Law Board. It is based on the most authentic principles of the Islamic law.

The work on this Compendium had been initiated by the Board’s founder-Secretary General, the late Amir-e-Shari'at Maulana Minnatullah Rahmani. The first draft, prepared by Mufti Zafiruddin Saheb of Deoband’s Dar-ul-Uloom was sent for opinion to the leading 'ulama, muftis and lawyers of the country. It was thereafter referred for finalization to a Committee of Experts consisting of Mufti Zafiruddin, Maulana Ahmad Ali Sayeed, Maulana Burhanuddin Sambhali, Mufti Nematullah and myself. Deliberations of this Committee, supervised by the late Amir-e-Shari'at, were joined from time to time by some other 'ulama as well. This is how this compendium took its final shape. It covered the entire gamut of Muslim personal law including marriage, divorce, guardianship, custody of children, maintenance, gifts, wills, inheritance and waqfs. In October 2000 a final pre-publication reading was given to the manuscript by a group of 'ulama at the Delhi office of the Islamic Fiqh Academy (India).

In order to make the Compendium available to the practitioners of the modern law, judges, scholars and students, an English version was considered necessary. The complete operative portions of the Compendium, running into 440 Sections, has been translated for the Board by Professor Syed Tahir Mahmood. The English translation has been arranged under five Parts covering 34 Chapters.

The original Urdu version contains — besides a long Introduction by my illustrious predecessor, the late Maulana Syed Abul Hasan Ali Nadwi — also extensive notes in Arabic on every Section of the Compendium, drawn from several authentic books on the Hanafi law. These were considered unnecessary for the English version.

It is hoped that this work will be found useful by all those looking for a systematic presentation of the Islamic law in the English language.

Qazi Mujahid-ul-Islam Qasimi
President
All India Muslim Personal Law Board

Indraprastha Apollo Hospital
New Delhi
26 July 2001

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PART IV: LAW OF BEQUESTS

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PART VI: LAW OF WAQFS

PART I: LAW OF MARRIAGE

Chapter 1: Definition of 'Muslim'

Section 1

A 'Muslim' is one who has faith in Allah's existence, His unity and all His characteristics; and who believes in His Messengers, all His revealed Books and the Day of Judgment; and who is, further, convinced of the Prophet Hazrat Muhammadﷺ being the Last Prophet so that after him can come no other prophet of any kind; and who has faith in all the essentials of religion, i.e., in all those things whose communication by the Prophet Muhammadﷺ is essentially and undoubtedly known, and who affirms all those things by the word of mouth.

Chapter 2: General Principles of Marriage

DEFINITION OF MARRIAGE

Section 2

Marriage is an agreement between a man and a woman, based on the Shari'at principles, as a result of which mutual sexual relation becomes legitimate, paternity of offspring is legally established and mutual rights and obligations become enforceable.

OBJECTS AND PURPOSES OF MARRIAGE

Section 3

The purposes of marriage are perpetuation of human race and attainment of chastity, continence, mutual love, affection and peace.

STATUS OF MARRIAGE

Section 4

Marriage is compliance with injunctions of God's Book and His Prophet'sﷺ Sunnat; further it is the source of perpetuation of human race and attainment of chastity due to which human beings are protected against committing what is absolutely prohibited by religion. In the eyes of the Shari' at, therefore, marriage is not just a civil contract; it is also worship.

Rules of Marriage

Section 5

Different situations arising from the capacity to discharge the obligations resulting from marriage and the apprehension of indulging or not indulging in illegal sex make different also the rules of marriage, details of which follow:

(a) If a man is capable of providing for the woman's maintenance and other rights and is sure that if he does not marry he may indulge in illegal sex, it is farz (obligatory) for him to get married.

(b) If a man is capable of providing for the woman's maintenance and other rights and is not sure but has a strong apprehension that if he does not marry he might indulge in illegal sex, it will be wajib (essential) for him to get married.

(c) In normal circumstances marriage is a Sunnat-e-Mu'akkadah (Prophet's ﷺ Tradition which must be adhered to).

Explanation:

"Normal circumstances" mean that the man is capable of cohabitation and capacity to provide for maintenance and marital rights, but if he does not marry there is no risk of his indulging in promiscuity, and no risk that in the case of getting married he might forsake faraez (obligatory precepts of Islam) and Sunnat-e-Mu'akkadah (Prophet's ﷺ Traditions which must be adhered to).

(d) Getting married is haram (absolutely prohibited) for a man who does not have the capacity to provide for dower, maintenance and marital rights, or is sure due to his temperament that he will be guilty of cruelty and excesses towards the would-be wife.

(e) If a person is not sure but has apprehension of meting out cruelty to the would-be wife, getting married is makruh-e-tahrimi (essentially avoidable).

Note: Rules of Shari'at for marriage are the same for women as for men, except that for women there is no condition of capacity to provide dower and maintenance.

Proposal for Marriage

Section 6

It is lawful for a man to propose to a woman marrying whom is for the time being lawful for him. But if there is a permanent or temporary bar to marriage between a man and a woman, it is not lawful for him to propose to her.

Explanation:

Since sister, paternal aunt and sister's daughter, etc. are permanently prohibited in marriage it is not lawful to propose to them. Similarly, it is not lawful to propose to a woman who is married to another man, or who is undergoing 'iddat of revocable or irrevocable divorce or of death. However, to a woman undergoing 'iddat of death such words may be said which do not constitute an express proposal but indicate a proposal.

Section 7

One should not propose to a woman to whom another man has already proposed and whose, or whose guardian's, response thereto has become known. But if subsequent to some one else's proposal one proposes to and marries her, the marriage will be lawful.

Section 8

It is lawful for a man to see the woman he wants to marry.

Section 9

It is lawful for a woman to propose to a man marrying whom is for the time being lawful for her.

Section 10

It is lawful for the woman, too, to see the man who has proposed to her.

Explanation:

It is, however, better that the proposal is given by the woman's guardians and not by the woman herself, so that it is not regarded as immodesty.

Section 11

It is haram (absolutely prohibited) for the parties to a proposal to be together in privacy.

Section 12

When a marriage is fixed, in the Shari'at it is a "promise to marry" in which there is no legal obligation. If after the marriage is fixed either party backs out, he or she cannot be compelled to marry.

Section 13

To put on a ring by way of engagement, pay a sum in cash, put on clothes, or give some other gift, is a sign of consent for marriage; but due to such an action one cannot be compelled for marriage.

Section 14

After a marriage is fixed, if the boy or the girl gets married to some other person, the marriage will be valid, and it will not be correct to demand dissolution of that marriage.

Section 15

If before the marriage the dower or part thereof has been paid in the form of cash or goods, and then for some reasons the marriage could not take place, the boy will have a right to reclaim the said cash or goods; and if the said cash or goods cannot be returned, it is lawful to take its substitute.

Section 16

If the presents given on engagement are available and the proposal fails, it is lawful to take back those presents.

Chapter 3: Essentials of Marriage

Section 17

A proposal, and its acceptance, are essentials of marriage; no marriage can come into existence without both of these.

Definition of Proposal and Acceptance

Section 18

The words in which a proposal is made by either party to the marriage, directly or through a guardian or representative, is called ijab (proposal); and the words in which the proposal is accepted by the other side is called qubul (acceptance).

Kinds of Marriage

Section 19

There are two kinds of marriage: valid marriages and invalid marriages.

Section 20

A valid marriage is one in which are found all the essentials and conditions of marriage.

Conditions for Validity of Marriage

Section 21

Among the conditions of marriage some are essential for the validity of offer and acceptance, some relate to those uttering the words of offer and acceptance, and some relate to the woman.

Section 22

Conditions relating to offer and acceptance are as follows:

(a) Same Occasion: It is essential that the proposal and acceptance are made on the same occasion; if after the proposal and before the acceptance the occasion changes, or the other party so acts that it shows his or her lack of interest or indifference, the proposal will become defunct and its acceptance will not be tenable. If the proposal is made through a messenger, orally or in writing, its acceptance will be tenable on the same occasion when the message is conveyed or read out, provided that two witnesses are present in that sitting.

(b) It is essential for proposal and acceptance to correspond, i.e., the person to whom and the dower on which marriage has been mentioned in the proposal: the acceptance should be given for marriage to the same person and on the same dower. However, where the proposal is from the man's side and while accepting it from the woman's side the amount of dower is reduced, or the proposal is from the woman's side and while accepting it from the man's side the amount of dower is increased, in such situations the proposal and acceptance will be regarded as mutually corresponding and the marriage will come into existence. But if it is the other way round, i.e., if the woman has increased the dower mentioned by the man or the man has reduced it, no marriage will come into existence.

(c) If the acceptance is made before the proposal is complete, the acceptance will not be tenable.

Explanation:

For instance if some one says "My daughter to you in marriage I gave", and before the word "gave" is pronounced the other party says "I accept", the acceptance will not be tenable.

(d) It is essential to use such words for proposal and acceptance which signify establishment of marriage with immediate effect. If the proposal or acceptance are related to a future time, or made dependent on a future contingency, there will be no marriage.

Explanation:

For instance, if on 1st November 1990 a person says "I gave my daughter in marriage to you" and the other party says "I have accepted it as on 5 November 1990", or that "I accept provided that my father also likes it" — in either case there will be no marriage.

(e) It is necessary that for both proposal and acceptance words of the past tense be used, or of past tense for one and the present for the other, or an imperative for proposal and past tense for acceptance, or the present tense for both; and if the future tense is used for either there will be no marriage.

Explanation:

For instance, if Zaid said to Amr "I gave my daughter Hinda in marriage to you for a dower of ₹ 5000 and Amr said "I accepted"; or Zaid said to Amr "I gave my daughter Hinda in marriage to you" and Amr said "I accept"; or Zaid said "I take you in marriage for myself" and Hinda said "I give myself in marriage to you"; or Zaid said to Hinda "Give yourself in marriage to me" and Hinda said "I gave"; in all these cases a marriage will come into existence.

Some Essential Rules relating to Offer and Acceptance

Section 23

For proposal and acceptance it is necessary to utter such words which seem to signify immediate establishment of relationship between the parties, whether those words affirm this meaning literally or by implication or usage and whether the language is Arabic or non-Arabic — as nikah (marriage), zawaj (matrimony), biyah (marriage), hiba (gift), baksh dena (giving away), malik bana dena (make master), etc. On the contrary, if words like ariyat (lease) or ijara (rent) are used, there will be no marriage.

Section 24

To establish a marriage it is also necessary that no such words are mentioned in the proposal and acceptance which signify that the marriage is for a fixed period.

Section 25

As regards those dumb persons who know how to write, their proposal or acceptance in writing will be valid.

Section 26

As regards dumb persons who do not know how to write, for their proposal and acceptance their customary gestures will be valid.

Section 27

To establish a marriage it is necessary that in the words of the proposal and acceptance the parties are so mentioned that both become known and certain for each other and for the witnesses. If the parties or either of them is present on the occasion of marriage, pointing to them will be enough for ascertainment.

Section 28

For the validity of a marriage it is necessary that two men or a man and two women be present at the time of proposal and acceptance.

Section 29

It is necessary for the witnesses to a marriage:

(a) to be Muslim;

(b) to be of sound mind;

(c) to be adult; and

(d) for both the witnesses to hear and understand together the proposal and the acceptance — if the witnesses are deaf and cannot hear the proposal and acceptance, no marriage will be established;

(e) for the groom and bride being known and certain for the witnesses.

Section 30

The parents and offspring of the groom and the bride can also be witnesses to the marriage, but it is better to have others as witnesses.

Explanation:

If ascendants or descendants act as witnesses, the marriage will be established but their evidence will not be admissible to prove the marriage in a court and, therefore, it is better to have others as witnesses.

Section 31

It is necessary for those making a proposal, or giving the acceptance, to listen to the words of the acceptance, or the proposal, and fully know that these words are for the establishment of a marriage.

STIPULATIONS IN MARRIAGE

Section 32

If in a marriage a condition has been stipulated which is repugnant to the objects of marriage, or which is haram (absolutely prohibited) by the Shari'at, the condition will be void and the marriage will be valid.

Explanation:

For instance, to stipulate a condition that the parties shall not be each other's heir, or that the wife will participate in public functions without a veil, will be void.

Prohibited Degrees in Marriage

Section 33

The woman a man is getting married to must not be prohibited for him either perpetually or temporarily.

Section 34

There are two different situations of a marriage being absolutely prohibited:

(a) to be absolutely prohibited for ever — which is called “perpetual prohibition”; and

(b) prohibition for the time being, limited to specific circumstances or specific time — which is called “temporary prohibition”.

Section 35

There are three reasons for perpetual prohibition:

(i) consanguinity;

(ii) affinity; and

(iii) fosterage.

Prohibition due to Consanguinity

Section 36

Marriage to the following women is absolutely prohibited due to consanguinity:

(a) mother and maternal and paternal grandmothers how high soever;

(b) daughter, son’s daughter and daughter’s daughter how low soever;

(c) sister — whether full, consanguine or uterine;

(d) paternal and maternal aunt — whether full, consanguine or uterine;

(e) daughters of brothers — full, consanguine or uterine, and their descendants how low soever;

(f) daughters of sisters — full, consanguine or uterine, and their descendants how low soever.

Prohibition Due to Affinity

Section 37

Affinity signifies those relations which are created by marriage.

Section 38

Marriage to the following women is absolutely prohibited due to affinity:

(a) one's wife's mother, maternal and paternal grandmothers and all other ascendants;

(b) wives and former wives of one's son, son's son, daughter's son, and all other descendants;

(c) women married to one's father, paternal and maternal grandfathers, and all other ascendants;

(d) children and grandchildren, how low soever, of one's wives with whom one has consummated the marriage.

Explanation:

If a person marries a woman who has a daughter by her former husband and later for some reason the said woman does not remain married to him, in case she had established physical relation with that woman her daughter by her former husband and descendants how low soever will be absolutely prohibited for him. However, if he had not established physical relation with that woman, marriage to her daughter and her descendants will be valid.

Section 39

In those situations where a valid marriage creates the bar of affinity the said bar will not be created if there was an irregular marriage. However, if the irregular marriage was followed by consummation or symbolic consummation, it will create the bar of affinity.

Explanation:

Symbolic consummation means various forms of sexual activity without actual coitus.

Section 40

Fornication or symbolic fornication with a woman also creates bar of affinity.

Prohibition Due to Fosterage

Section 41

If a boy or girl below the age of two and a half years is suckled by a woman, it will establish bar of fosterage.

Section 42

A marriage is prohibited due to fosterage as well with all those relations with whom it is prohibited due to consanguinity.

Section 43

The woman suckling will be the foster-mother of the child suckled and her husband causing that milk into her will be the child's foster-father. Ascendants and descendants of the suckling woman, and of her husband, whether by that woman or by another wife, will be absolutely prohibited for the child suckled and its descendants.

Section 44

For the woman suckling and her ascendants and descendants, as also for her husband and his ascendants and descendants, the suckled child's spouse and descendants, shall be within prohibited degrees.

Section 45

Fosterage creates bar to marriage on the following conditions:

(a) The suckling woman must be at least nine years of age; suckling by a girl below this age is to be disregarded for this purpose.

(b) Milk must have been suckled in its original condition; if it is frozen or cooked with some food item, it will not create the bar.

(c) If the woman's milk is mixed with animal milk or with some medicine or water, the bar will be created only if it is dominant in the mixture.

(d) The bar will be created only if milk is either directly suckled or taken out and dropped into the child's mouth or nose, not if it is inserted into the stomach by any other means.

(e) If two women's milk is mixed and fed, the bar will be created in respect of both women.

(f) It is necessary that milk should reach the child's stomach; child's action short of it will not create the bar.

Section 46

Evidence of two just men or a just man and two just women is essential for proof of fosterage.

Explanation:

If two just (religious and reliable) men or one man and two women give the information that the woman to be married, or married, is prohibited for the man due to fosterage, marriage will be absolutely prohibited; and if it has already been contracted, separation will be necessary. If one just man or woman gives such information, it will not be lawful to marry; and if the marriage is already existing separation will be better but not essential.

Section 47

Man's acknowledgment either before or after marriage, and woman's acknowledgment before marriage, will be sufficient for the proof of fosterage. Woman's acknowledgment after marriage will be regarded as her claim which will require witnesses for its proof.

INVALID MARRIAGE

Section 48

An invalid marriage is one which is lacking in the constituents and conditions of marriage, or in any of these constituents and conditions.

Section 49

Invalid marriages are of two kinds, viz.: (i) void marriages, and (ii) irregular marriages.

Section 50

A void marriage is one which according to the Shari'at does not come into existence at all.

Section 51

An irregular marriage is one which is neither valid nor void. Before consummation such a marriage is governed by the rules of void marriages; and after consummation it gives rise to the effects and rules of marriage. In both these situations separation is necessary either by mutual renunciation or by the order of the qazi.

Section 52

The following marriages are void:

(a) a marriage in which proposal and acceptance have some such flaw due to which these are not valid as per the prescribed conditions.

(b) a marriage in which those uttering the words of proposal and acceptance lack in the necessary capacity;

(c) a marriage to a woman who is prohibited to the man due to consanguinity, fosterage or affinity, or who is married to or is observing 'iddat for another man, or is the triply-

divorced wife of the man marrying while there has been no intervening marriage, or marriage to whom during the subsistence of that to the present wife is prohibited, or is neither Muslim nor kitabiyah;

(d) a marriage either party to which is an apostate; or in which the man is non-Muslim while the woman is Muslim.

Section 53

All invalid marriages other than void marriages will be regarded as irregular.

Section 54

In an irregular marriage, before consummation none of the legal rules of marriage becomes applicable.

Section 55

In an irregular marriage, after consummation the following legal rules will become applicable:

(1) Proper or specified dower, whichever Is less, shall be obligatory; and if no dower had been fixed at the time of marriage proper dower will be due.

(2) Paternity of children shall be established as per the conditions stated in the Chapter on Legitimacy (see Part II, Section 109).

(3) 'Iddat will be obligatory after mutual renunciation or separation.

KINDS OF VALID MARRIAGE

Section 56

A valid marriage may be of either suspended or immediate effect.

Section 57

A valid marriage may be either binding or non-binding.

Section 58

A valid marriage fulfilling the following conditions will be of immediate effect; otherwise it will be of suspended effect:

(a) If the man and the woman directly exchange the proposal and acceptance, or name their representatives for it, both of them, or the representatives, as the case may be, must be major and of sound mind. If discerning minor boys or girls themselves make the proposal or give the acceptance, the marriage will depend on the guardian's consent; and if an insane person does so there will be no marriage.

(b) If a remoter guardian contracts into marriage a minor or insane boy or girl, it will depend on the nearer guardian's consent.

(c) If a representative in marriage exceeds the powers given by the person whom he represents, the marriage will depend on the said person's consent.

BINDING AND NON-BINDING MARRIAGES

Section 59

A binding marriage is one in which guardians of either party have no option of termination; and if there is such an option it is non-binding.

Section 60

On the following conditions a valid marriage becomes binding:

(a) Marriage of a minor boy or girl should have been contracted by the father or paternal grandfather, and of an insane person by the father, paternal grandfather or son.

Explanation:

If a minor boy or girl has been contracted into marriage by a guardian other than father and paternal grandfather the marriage, even if it is among equals and with a proper dower, will not be binding and the boy or girl will be entitled to option of puberty. If an insane person has been contracted into marriage by a person other than father, paternal grandfather and son, this marriage too will not be binding and on recovery the person will have an option between remaining in marriage or repudiating it. In both cases termination will be effective only after the intervention of the qazi.

(b) If an adult and sane woman marries an equal with a proper dower the marriage, even if without her agnatic guardian's consent, will be obligatory.

Explanation:

If an adult and sane woman without her agnatic guardian's consent marries an equal on less than the proper dower, the guardian will be entitled to demand from the husband completion of the proper dower, and if the husband does not agree to it on the guardian's demand the qazi shall terminate the marriage. And if she has married a non-equal, the guardian can get the marriage terminated by the qazi. [See for details Part II, Section 70].

(c) If there has been no misrepresentation in respect of kufu' (parity of parties to marriage), the marriage shall be binding.

Explanation:

If the husband had misrepresented himself to be an equal to the woman, both the woman and the qazi will be entitled to have the marriage terminated.

Section 61

In all those situations where a person is entitled to retain or reject the marriage, only rejection by that person will not terminate the marriage; intervention of the qazi will be necessary for its termination.

Marriage of Non-Muslims

Section 62

A marriage between a man and a woman solemnized before their conversion to Islam will remain intact after conversion if it fulfils all the conditions and terms for the validity of marriage as prescribed by the Shari'at.

Section 63

If the existing marriage between two non-Muslims is lacking in some of the conditions which according to the Islamic Shari'at are necessary, two situations are possible:

(a) the missing conditions may relate to the solemnization of marriage, e.g., presence of witnesses; or

(b) the missing conditions may relate to both the solemnization and continuation of marriage, e.g. absence of prohibited degrees of relationship since this is necessary equally for both the solemnization and continuation of marriage.

Section 64

In the first situation aforesaid if the parties embrace Islam together, their marriage will continue and no fresh marriage will be required.

Section 65

In the second situation aforesaid, i.e., where the conditions missing are necessary for the retention and continuation of marriage, if both parties together embrace Islam, or either of them does so, the marriage will not remain intact. For instance, where a non-Muslim has married his sister's daughter, if he embraces Islam or both parties embrace Islam, the marriage will not continue to exist and separation will be necessary.

Section 66

If in the first situation aforesaid only the wife embraces Islam, where this is possible Islam shall be offered thrice to the husband, and if he accepts it the marriage will continue. If the husband rejects Islam or keeps quiet, where this is possible the qazi may separate them, and thereupon the woman may after observing 'iddat marry a Muslim. If it is not possible to offer Islam or to seek separation by the qazi, the woman's marriage will get terminated after she has had three menstrual courses, or after three months if she does not menstruate,

or on the delivery of child if she be pregnant; and then she can remarry after observing 'iddat.

Section 67

If in the first situation aforesaid only the husband embraces Islam and the wife is a kitabiyah, the marriage will remain intact. If she is a non-kitabiyah, where it is possible to offer Islam to her this will be done thrice; and if she accepts it or becomes a kitabiyah, the marriage will continue; otherwise the parties will be separated. If offering Islam or effecting separation is not possible, the marriage will be automatically terminated after three menstrual courses, or three months, or upon delivery in case of pregnancy, as aforesaid.

Section 68

If a Muslim woman becomes an apostate her apostasy will not terminate the marriage.

Section 69

If a Muslim woman's husband becomes an apostate the marriage will get immediately terminated.

Chapter 4: Guardianship in Marriage

Section 70

Guardianship in general is the legal right due to which a person's authority over another person is enforced without the latter's consent.

Section 71

Marriage-guardianship is the legal authority due to which a person can contract a minor or a mentally handicapped person into marriage, without their consent, by his own will.

Section 72

A person can get marriage-guardianship over another due to two reasons:— (i) relationship, i.e., family tie; and (ii) imamat, i.e. the authority of the Amir (religious head), Caliph or his deputy, ruler, or qazi, who in some special circumstances gets the right to contract someone into marriage.

Section 73

The conditions for being a guardian are that one must be Muslim, adult and of sound mind — whether a man or a woman.

Section 74

Guardians of a minor boy or girl and of the mentally handicapped have guardianship rights over them.

ORDER OF GUARDIANSHIP

Section 75

Guardianship due to relationship:– Among the relatives guardianship belongs first of all to those who are “agnates in their own right”.

Section 76

“Agnates in their own rights” are those men who are related to the boy or girl without the intervention of a woman, e.g., son, father and father’s father.

Section 77

Agnates have guardianship rights in the following order:

(i) son, son’s son and their descendants how low soever;

(ii) father, father’s father how high soever;

(iii) full brother, consanguine brother, and their descendants how low soever;

(iv) full paternal uncle, consanguine paternal uncle and their descendants how low soever.

Section 78

If there are two or more agnates of the same class, guardianship will belong to those among them who is nearer in degree.

Section 79

If there are two or more agnates of the same class and the same degree, all are equally entitled to guardianship, whoever among them may first give the ward in marriage it will terminate the authority of othe₹

Section 80

If among the agnates no guardian is present, guardianship will belong to the other relations in the following order.

(1) mother, (2) paternal grandmother, (3) daughter, (4) son’s daughter, (5) daughter’s daughter, (6) son’s daughter’s daughter how low soever, (8) maternal grandfather, (9) full sister, (10) consanguine sister, (11) uterine sister, (12) uterine sister’s descendants, (13) uterine heirs in this order:

(a) paternal aunts, (b) maternal uncle, (c) material aunt, (d) paternal uncle’s daughter, (e) descendants of these in the given order.

Section 81

Guardianship due to imamat:– If none of the guardians mentioned above is present, guardianship will belong to the Amir and Caliph, or the qazi to whom marriage-guardianship is delegated by the law, and then to his deputy authorised by the qazi.

Section 82

In the order of guardianship if there is no nearer guardian it will pass on to the remoter guardian; and if a remoter guardian gives the ward in marriage it will depend on the nearer guardian's consent.

MARRIAGE BY FATHER OR PATERNAL GRANDFATHER

Section 83

The marriage of a minor or mentally handicapped boy or girl arranged by his or her father or paternal grandfather, whether to equals or non-equals and whether on proper dower or not, becomes binding.

Provided that if the father or paternal grandfather has manifestly misused his authority or is a known sinner or an impudent person, the marriage to a non-equal will not come into existence. Similarly, if such a father or paternal grandfather has married his daughter or son's daughter on a dower much less than the proper dower, or his son or son's son on a dower much higher than the proper dower, the marriage shall not come into existence.

Explanation:

(a) "Manifest misuse of authority" will be presumed where it is clear that the guardian has not selected a proper bride or groom for his minor or mentally handicapped son, daughter, son's son or son's daughter, and that the hope of well-wishing and affectionate behaviour which one can have from a father or grandfather has not been fulfilled.

(b) "Known sinner" means one who openly violates religious rules.

(c) "Impudent" means a person who is reckless or shameless.

Section 84

If in a case it is apparent that the father or grandfather due to selfishness, greed, personal interest or lack of intellect has married his minor or mentally handicapped son or daughter, or son's son or son's daughter, to an unsuitable boy or girl, no marriage will come into existence, even though there may be no such past experience in relation to him. The same rule applies to a marriage contracted on a much lower or higher dower – in which case too no marriage will come into existence.

Section 85
If the father or grandfather has in an inebriated state of mind contracted into marriage his minor or mentally handicapped son, daughter, grandson or granddaughter, to a non-equal, or on a dower much lower or higher than the proper dower, no marriage will come into existence.

Guardian's Absence, Disappearance or Imprisonment

Section 86
If the guardian is of unknown whereabouts, i.e., nothing is known about his life or death, guardianship will keep on passing from one to another guardian in the order given above.

Section 87
If the guardian is absent, i.e., though it is known that he is alive but is absent since long and cannot be contacted, he will be governed by the rules of law applicable to persons of unknown whereabouts and the guardianship will pass on to the next person in the order given above, provided that the absent guardian has not appointed a representative.

Section 88
If the guardian is absent and his address is known so that he can be contacted, it will be seen whether he lives so far away that obtaining his consent will result into extraordinary delay and there is a high risk that a suitable proposal now available may be missed due to such delay, remoter guardians will have a right to give consent to the marriage.

Section 89
If it is possible to obtain the consent of the nearer guardian and there is no apprehension of an extraordinary delay and risk of missing a suitable proposal, obtaining his consent will be necessary. If a remoter guardian contracts the ward into marriage without obtaining the nearer guardian's consent, the marriage will be dependent on the real guardian's consent.

Section 90
If the guardian is in jail and it is possible to obtain his consent on time and there is no risk of missing a suitable proposal, it will be necessary to obtain his consent; otherwise the authority will pass on to the remoter guardian.

Avoidance of Consent by the Guardian

Section 91
If a guardian without a reasonable excuse avoids giving consent to the marriage of a boy or girl under his guardianship despite a suitable proposal being available, and the delay might result into missing it, and the interest of the boy or girl concerned certainly lies in an early marriage while it is highly probable that not arranging it will be prejudicial to him or

her, the qazi will have the authority to contract the marriage of the minor or the mentally handicapped person concerned. Where there is no qazi, this authority will belong to the remoter guardian.

Section 92

In the case of avoidance by the guardian if the qazi contracts the ward into marriage, there may be two situations, viz., the guardian avoiding marriage may be (i) the father or paternal grandfather, or (ii) some other guardian. In the first situation the minor or the mentally handicapped person will have no option to repudiate the marriage on becoming major or sane; in the second situation they will have such an option.

Chapter 5: Representation in Marriage

Section 93

All sane and adult men and women have the authority, instead of contracting a marriage themselves, to name a capable person as their wakil (representative) and entrust to that person their rights relating to contracting a marriage. Representation may be of two kinds: (1) general, and (2) special.

Section 94

General representation means that a sane and adult man or woman names a representative and says: "You are authorized to contract me into marriage to whomsoever, and on whatever dower, you may want".

Section 95

Special representation means that a sane and adult man or woman names a representative saying: "You are authorised to contract me into marriage to so and do on such and such dower" (other party and the amount of dower specified).

Section 96

The guardian may also name a representative for his male or female ward; and in this case too the representation may be either general or special.

Section 97

Appointment of a representative may lawfully be made either orally or in writing; and it is preferable to have two witnesses on the occasion.

Section 98

The same person may be the representative of both the parties to a marriage. Also, a person may be acting for himself from his side and as the representative for the other side.

Explanation:

For instance if a boy and a girl both sane and adult appoint the same person as their representative, he can make proposal from one side and give acceptance from the other side. Similarly if a sane and adult woman appoints a person as her representative and authorises him to marry her himself, it will be lawful for him to make a proposal on behalf of the said woman and give acceptance from his side.

Section 100

Dower cannot be demanded from the representative in a marriage, for the reason that the position of the representative in marriage is only of a spokesman, and he does not incur any obligation in respect of the marriage contract.

Section 101

If a representative contracts into marriage the woman who has appointed her to an un-equal person, the marriage will be voidable at her option.

Section 102

If the man's representative fixes up a dower which is much higher than the proper dower and is prominently higher than the prevalent amount, or if the woman's representative fixes up a dower which is much less than her proper dower so that it is a cause of disgrace, the marriage shall not be binding on them. However, such a marriage is governed by the rule relating to fuzuli (unauthorised person) and if the person who has appointed the representative (man or woman) accepts the marriage on the dower as fixed by him or her, the marriage will take effect.

Section 103

If the representative has been given an absolute authority without any limitation, he shall be bound not to contract into marriage the woman or man who has appointed him to a person suffering from a serious and prominent defect.

Consent of Adult Girl

Section 104

It is necessary for the nearer guardian to contract the marriage of a sane and adult woman with her consent; and if he does not do so the marriage will be voidable at the girl's option.

Section 105

It will be in accordance with the Sunnat (Prophet's ﷺ Tradition) if the guardian personally seeks the girl's consent for nikah; and before finalizing the marriage it is preferable for him to ascertain through a suitable person her response to the proposal.

Section 106

If the nearer guardian does not personally seek the consent rather sends someone named by him as his representative or messenger, the said representative or messenger should specify before the girl that he is seeking her consent as a representative or messenger.

Section 107

If the nearer guardian himself or his representative or messenger seeks the consent of an adult virgin girl, express consent from her side is not necessary, and expressions which are by custom seen as a sign of consent will be regarded as her permission and willingness.

Section 108

If a person other than the nearer guardian or his representative or messenger seeks the consent of an adult virgin girl, signs of consent will not be enough and permission will be tenable only if consent is given expressly.

Section 109

If while seeking the girl's consent to marriage the person doing so has not mentioned the would-be husband with certainty, girl's silence will not be enough and specific expression of her consent will be necessary.

Section 110

While seeking consent the would-be husband should be so mentioned as to make his identity certain, for instance, by specifying the husband's name, parentage and if necessary, also place of residence.

Section 111

While seeking consent it is preferable to mention the amount of dower.

Section 112

If the adult girl is saiyebah (one who has experienced an earlier consummated marriage), giving consent by the word of mouth is necessary.

Explanation:

Saiyebah means a woman whose earlier valid or irregular marriage was consummated or who is generally known for her sexual experience.

Section 113

If an adult virgin is contracted into marriage without her consent by her nearer guardian and after the marriage she is informed of it by the said guardian himself or by his representative or messenger or some other reliable person, and some sign of willingness is

found on her side, it will be regarded as consent for marriage; but if the girl is a saiyebah to obtain her express consent by word of mouth will be necessary.

Chapter 6: Unauthorised Marriage

Section 114

If a person contracts his or her own, or someone else's marriage without a Shari'at-recognized right to do so, this will be a nikah-e-fuzuli (marriage by unauthorised person); and it will be voidable at the option of the person who has the authority to get it annulled/recognized by the Shari'at.

Section 115

If the authorised person accepts the marriage contracted by the unauthorised person it will be effective; otherwise it will be void.

Explanation:

For instance, if a discerning minor contracts his own marriage, or a stranger contracts the marriage of a minor or mentally handicapped person without his or her guardian's consent, in either case the marriage will be fuzuli and will depend on the consent of the guardian. Similarly, if someone contracts the marriage of a sane and adult person, this too will be nikah-e-fuzuli and will depend upon the consent of the said sane and adult person.

Chapter 7: Equality in Marriage

Section 116

Kafa'at literally means equality. In the terminology of Shari'at equality and parity of the husband to the wife in respect of certain matters is called kafa'at (equality in marriage).

Section 117

Regard shall be had to equality in marriage in the following matters:

(1) The boy should be an equal of the girl in respect of adherence to faith and piety.

(2) Financial status:

(a) The husband should have the capacity to provide maintenance in accordance with the wife's status.

(b) There should not be such difference between the financial status of the two as to cause disgrace to the girl.

(3) Regard shall be had in respect of descent among the Arabs, especially the Quraish, and those non-Arab families who have preserved descent. People in the rest of the non-

Arab Muslim world are mutually equal. On the basis of this principle a girl can get terminated her marriage to a non-equal contracted by her guardian; and a guardian has the right to terminate the marriage of an adult woman to a non-equal.

Section 118

The girl or her guardian will have no authority to have a marriage terminated due to difference in vocation or profession, except where the concerned profession is regarded in the society as very mean.

Section 119

Convert Muslims and born Muslims are equal to one another.

Section 120

In respect of marital parity it is necessary for the man to be an equal of the woman; while the woman need not be an equal of man.

Section 121

Regard to marital parity shall be had at the time of marriage; if the husband was unequal at the time of marriage but no more remains an equal, there will be no right to have the marriage dissolved.

Explanation:

For instance, if he was affluent but has become indigent; or had the capacity to provide maintenance but has become poor, the wife will have no right to dissolution of marriage on the ground of lack of equality.

Section 122

The wife and her guardian both have a right to ensure 'equality in marriage'. Therefore, if a woman has deliberately married a non-equal the guardian will have the authority to have the marriage dissolved.

Section 123

If an adult woman marries a person without ascertaining his equality and later it transpires that the said person is not an equal, the woman will have no right to have the marriage dissolved on the ground of lack of equality. Her guardian will, however, have such a right.

Section 124

If a woman and her guardian both know that the would-be husband is not an equal and yet the marriage takes place with the consent of the woman and her guardian, neither she nor he will now have a right to separation on the ground of lack of equality.

Section 125
If the husband misrepresents himself to be an equal and it is proved after the marriage that he is not an equal, the woman and her guardian both shall have a right to dissolution of the marriage.

Section 126
If a nearer guardian gives his consent to marriage to a non-equal, other guardians will have no option to have the marriage dissolved.

Chapter 8: Effects of Marriage

Dower

Section 127
Dower is the mal (money or property of any kind) which is an obligation of the man towards the woman as a result of the marriage or its consummation.

Section 128
Dower is a financial right arising from the marriage contract which is an obligation in all circumstances, even if at the time of marriage it was agreed upon that there will be no dower.

Section 129
The minimum amount of dower is ten dirhams, the weight of which is 30.618 gm. silver. Therefore the minimum dower in every age and every country will be the amount which can buy 30.618 gm. silver. There is no maximum of dower.

Section 130
Dower can be any such mal (money or property of any kind) taking the benefit of which is permissible in the Shari'at, which is known and certain, and which the man has the capacity to give — e.g., gold and silver or coins made out of these, or their substitute currency (coins, notes), things that can be weighed or measured, animals, land or other trading goods, and similarly the benefit derived from something against which mal can be acquired, e.g., usufructuary rights on land, house or transport.

Section 131
Treating one marriage as the dower for another, called nikah-e-shighar, is not valid.

Explanation:
E.g., there are two persons: Ahmad and Mahmood, and both have one sister each. Ahmad’s marriage to Mahmood’s sister and of Mahmood to Ahmad’s sister are fixed. Now Ahmad

says at the time of marriage, “I accept marriage to your sister in return for my sister’s marriage” and Mahmood too says similarly. Here one marriage is being made the dower for the other. This is what is called nikah-e-shighar. In such a case the marriage will be valid but the proper dower will be due.

Section 132

Dower is of two kinds: (i) specified dower, and (ii) proper dower.

Section 133

Specified dower is the dower fixed at the time of marriage, or to which the parties have agreed after the marriage, or which the qazi has fixed after the marriage.

Section 134

If the specified dower is increased by the husband after the marriage and he divorces her before khilwat-e- sahihah (presumptive consummation of marriage), half of only the originally specified dower shall be payable without regard to the increase.

Section 135

If the parties are being separated after khiltoat-e-sahihah (presumptive consummation of marriage) and the dower was fixed at the time of marriage, the whole of this dower shall be payable; but if the separation is taking place before khilwat-e-sahihah, half of the dower fixed at the time of marriage shall be payable.

Section 136

If the parties have fixed the dower by mutual consent after the marriage, or it has been fixed by the qazi, and separation is taking place after khilwat-e-sahihah, in both situations the whole of dower shall be payable; but if separation takes place before khilwat-e saliihah, only mata‘ (compensatory payment) and not dower shall be payable.

Section 137

If no dower has been fixed at all either at the time of or after the marriage, and separation has taken place before khilwat-e-sahihah, only mata' (compensatory provision) and not dower shall be payable.

Section 138

If either party dies after marriage, whatever dower had been fixed either before or after the marriage shall be payable in full.

Section 139

If before the consummation of marriage or khilwat-e- sahihah (presumptive consummation) the parties are separated in a way not governed by the law of talaq, the

whole of dower shall abate; whether the cause of separation has arisen from the woman's side or man's.

Explanation:

E.g., if in a case of option of puberty separation takes place before khilwat-e-sahihah, the whole of dower shall abate.

Section 140

If the husband stipulates a certain special thing as dower and the said thing is lost before coming to the woman's possession, or is proved to be the property of another person, the husband will have to give in return for it another similar thing or its value.

Section 141

Proper dower means the dower of girls similar to the brides in her paternal family, provided that there is a notable parity between the groom and the husbands of the other girls in the paternal family.

Section 142

If there is a dispute in ascertaining the proper dower, it will be proved by the evidence of two men or one man and two women. If there is no reliable evidence, husband's statement on oath shall be accepted.

Section 143

Proper dower shall be obligatory in the following situations, provided that separation between the parties has taken place after khilwat-e-sahihah (presumptive consummation of marriage), or if either of them has died:

(1) if no dower has been fixed for a marriage either at the time of or after the marriage;

(2) if the marriage took place on a condition that there shall be no dower; here the marriage will be valid and the woman will be entitled to proper dower unless the dower has been fixed after the marriage;

(3) if such a thing has been fixed as dower which is not capable of being dower, e.g., a grain of wheat, a glass of water, a dead animal, a pig, etc.; in all such cases proper dower will be payable.

Section 144

If the marriage is irregular but has been consummated, the proper or the specified dower, whichever is less shall be payable; and if no dower was fixed the proper dower shall be payable whatever be its amount.

Section 145

In a case of wati bil-shubhah (sexual relation under a mistaken belief about its validity) proper dower shall be payable.

Explanation:

Wati bil- shubhah may be of three kinds:

(i) Wati bil-shubhat-il-mahel also called wati bi-shubhat-il- milk or wati bi-shubhat-e-hukmiyah:— i.e., sex with a woman who seems to be lawful in view of Shari'at- ordained reasons although its validity is not established by mightier reasoning — e.g., if a person has sex with his wife whom he has impliedly divorced and who is now observing 'iddat of divorce, even if he had intended three divorces; or with an apostate wife; or with a wife who has become haram (within prohibited degrees) due to affinity.

(ii) Wati bi-shubhat-il-fel also called wati bi-shubhat-il- ishtibah: i.e., sex with a woman who does not seem to be lawful in view of Shari'at-ordained reasons but the man has considered sex with her legal on a mistaken ground — e.g., if he has had sex with his wife observing 'iddat after having been triply divorced by him in express terms, or who happens to be irrevocably divorced by khula' or talaq bil-mal (divorce for a consideration), or with a woman sent to her on the wedding night by other women describing her as his wife. In all these cases illegality of sexual relation is established, but there are some factors which make it appear legal.

(ii) Wati bi-shubhat-il-'aqd — i.e., having sex with a woman with whom proposal and acceptance for marriage have taken place but the validity of the marriage in the Shari'at is not established — e.g., having sex with perpetually prohibited women; or a woman married to or observing 'iddat for another man; or one’s triply-divorced wife without an intervening marriage; or with five women or two sister after marrying them together, or with the wife’s sister after marrying her; or after an irregular marriage. In all these cases, though there has been a formal marriage but in reality and by law there has been no marriage. If, therefore, after such a marriage a person has had sex with the woman it will be called wati bi-shubhat-il-'aqd.

PROMPT OR DEFERRED DOWER

Section 146

Prompt dower is the dower which has been paid at the time of marriage or which has been stipulated to be necessarily payable immediately on demand after marriage.

Section 147

Deferred dower is the dower for the payment of which some time has been fixed, however nearer or farther from the marriage it may be.

Section 148

If at the time of marriage it has not been clarified whether the dower will be prompt or deferred, or it has been stipulated to be deferred but no time has been fixed, custom and usage shall be relied upon and on the basis of custom the dower shall be payable on divorce or after a particular duration.

Section 149

Parties to marriage are free to fix up the whole of dower as prompt or deferred, or as partly prompt and partly deferred.

Section 150

If the dower has been stipulated to be prompt, the woman can lawfully abstain from consummation of marriage until its payment.

Section 151

Dower is the woman's personal property. She can forgo it, in part or fully, except during her death-illness.

Section 152

The man is free to increase the specified dower, and an increase will be binding after the woman has accepted it.

Obligatory and Mandatory Dower

Section 153

In a valid marriage dower becomes payable due to the marriage-contract itself but can abate in certain cases. However, it becomes mandatory after khilwat-e-sahihah (presumptive consummation of marriage) or the death of either party, leaving no room for abatement.

Explanation:

For instance, where after a valid marriage the dower has become payable, if the parties are separated before khilwat-e-sahihah and it has been caused by the woman, dower will abate. If the separation takes place after khilwat-e-sahihah, even though it has been caused by the woman, or if either party has died, the dower will not abate and will have to be necessarily paid in full.

KHALWAT-E-SAHIHAH (PRESUMPTIVE CONSUMMATION OF MARRIAGE)

Section 154

If after a marriage the parties thereto meet in such a place where they can easily have sex and there are no sentimental, natural or legal inhibitions, it will be regarded as khilwat-e-sahihah.

Explanation:

Jurists have not given a complete definition of "sentimental, natural or legal inhibition". They have, however, given by way of Explanation Examples of all these and said that different situations may be regarded as Examples of one or, at once, of all three or any two of them. For instance, among the Examples of sentimental inhibitions is the situation where the parties meet at a place where a third person may come, as in an open place or open house, or where a third person is present who can feel performance of the sexual act (these may also be correctly regarded as legal and natural inhibitions); or there is an animal which can cause harm, or where both or either of them is inflicted with a disease which prevents sexual act, e.g., if they are ill, or if the wife's private parts are defective so as to prevent sexual act, or the parties are or either of them is so young that they cannot have a sexual act. Among the Examples of natural inhibitions mentioned are wife's state of being in menstrual period or in puerperal bleeding, which are also Examples of legal inhibition. Among the Examples of legal inhibitions are where the parties are or either of them is in the ihram (pilgrim's prescribed robe) of Haj, farz (obligatory) or nafl (voluntary) and 'umrah, or is fasting during the month of Ramazan, or is busy in farz (obligatory) namaz (prayers).In all these situations, being together is not khilwat-e-sahihah for the parties. However, if both are or either of them is on voluntary fasting, or if the wife is without the husband's consent in the ihram of voluntary Haj, their being together in such a state will establish khilwat-e- sahihah.

Section 155

For the purposes of the following rules khilwat-e-sahihah stands for actual consummation of marriage:

(i) to make the whole of dower obligatory;

(ii) to prove paternity;

(iii) to make 'iddat obligatory;

(iv) to make obligatory wife's maintenance and residence during 'iddat;

(v) to prohibit marriage with wife's sister;

(vi) to prohibit a fifth marriage while one of the four wives is observing 'iddat;

Section 156

In the following situations khilwat-e-sahihah does not stand for actual consummation of marriage:

(i) wife's daughter not being prohibited for marriage to the husband;

(ii) a triply-divorced wife not being legal for the husband;

(iii) right of revoking a divorce not being available — i.e., a divorce pronounced after khilwat-e-sahihah will be revocable and not irrevocable;

(iv) wife not being entitled to inherit deceased husband's property despite being in 'iddat;

(v) in respect of consent of marriage a girl who has been only in khilwat-e-sahihah shall be regarded as bakirah (not previously married);

(vi) in respect of the Shari'at-ordained punishment for illegal sexual relation, it is regarded as adultery only if the married parties have had sexual relation; not so if they have had only khilwat-e-sahihah.

DISPUTE OVER AMOUNT OF DOWER

Section 157

Where the parties disagree about the amount of dower:

(a) if both parties tender evidence the claim of either party which is not in consonance with proper dower, i.e., is different from it, will be accepted;

(b) if only one party tenders evidence, in any case his or her evidence will be accepted;

(c) if neither party has tendered evidence, the claim of either party which is nearer the proper dower will be accepted if made on oath.

MATA' (COMPENSATORY PROVISION)

Section 158

Mata' or mut'ah literally means something which can be benefited from temporarily and for the time being. In the terminology of Shari'at, for mata' women's head- cover, shawl and shirt have been mentioned, i.e., things of this standard which may be locally prevalent and the value of which does not exceed half of the dower will be given by way of mata'.

Explanation:

The object of mata' is to present immediately something which to some extent may be consoling for the wife. Therefore, Shari'at recognizes generally giving some clothes or other goods relating to necessities of life as mata'.

Section 159

Providing mata' is obligatory for the husband in the following situations:

(a) where no dower has been fixed at the time of marriage and separation takes place before khilwat-e-sahihah, caused by the husband only with no role of the wife in it;

(b) where dower has been fixed after the consent of the parties and a divorce has taken place before khilwat-e-sahihah.

Section 160

Mata' is recommended even for all those situations in which its payment, or of half of the dower, to the divorced wife is not obligatory.

NAFAQAH (MAINTENANCE)

Section 161

The expenses which the Shari'at regards as necessary for the subsistence of some one's life are nafaqah (maintenance); and for human beings items of food and drink, clothes and residence are nafaqah.

CAUSES THAT MAKE MAINTENANCE OBLIGATORY

Section 162

There are three causes which make maintenance obligatory: marriage, relationship and ownership.

Explanation:

Maintenance of wife is obligatory for the husband by reason of her being his wife. Similarly, maintenance of an indigent relative is obligatory for his or her heirs-apparent, of parents for children, and of children for parents.

Section 163

Wife's maintenance becomes obligatory as a result of marriage. Therefore, whether the wife is a Muslim or a kitabiyah, affluent or indigent, healthy or sick, her maintenance is obligatory for the husband.

Section 164

Maintenance becomes obligatory on account of a valid marriage. Therefore, in the case of an irregular marriage no maintenance will be obligatory.

Section 165

A woman observing 'iddat is entitled to get maintenance; after 'iddat she is a stranger and no maintenance for her after 'iddat is obligatory for the divorcing man.

PART II: LAW OF DIVORCE

PRELIMINARY: DIVORCE IN ISLAM

Marriage is a blessing, and when this relationship is established it is meant to subsist and be lasting. It is through this relationship that God grants children. Divorce terminates marital relationship and leads to several problems in the family. Divorce in itself is, therefore, an undesirable act. However, it is also true that if there is no temperamental compatibility between the parties, or the man feels that he cannot as husband fulfill the woman's rights, or because of mutual difference of nature God's limits cannot he maintained, keeping the marriage intact in such situations or to compel the parties by legal restrictions to continue in the marital bond may be more harmful for the society. The Shari'at, therefore, regards divorce as permissible although it is an undesirable act.

Thus, uncontrolled use of divorce without regard to the restrictions established by the Shari'at is a sin. Similarly, imposing such restrictions on the right of divorce due to which the man is compelled not to divorce the wife despite the feeling that he cannot live a happy life with her is also not lawful.

The decision whether a man can live a happy life with his wife or not and whether divorce is necessary or not relates to the sentiments of the husband. The decision in this regard can, therefore, be taken by the husband himself. If the man is sure that he cannot have cohabitation as per rules, e.g., if he is impotent, or cannot fulfill marital obligations, or any other such situation is there, it will be necessary for him to pronounce a divorce. To divorce the wife without reason only to harm her, or revengefully due to the non-fulfillment of his unlawful demands by the wife or her guardians, and to divorce her in violation of the procedure prescribed by the Shari'at, is haram (absolutely prohibited).

Chapter 1: Faskh and Talaq

Section A

Separation between the parties to a marriage may be effected for different reasons. Separation may be by the option of the husband, by the mutual consent of parties, or by the decision of the qazi on the demand of the wife. The first situation is of talaq, the second of khula' and the third of faskh.

Section B

There are some basic distinctions between faskh and talaq, some of which are being mentioned below:

(a) In the case of faskh if none of the reasons that make dower mandatory are in existence, no dower will be payable; while in the case of a talaq, even if none of the reasons which make dower mandatory exists, full or half dower, or mut'ah, shall be payable.

(b) In the case of faskh, husband's right to three divorces is not affected, and if the parties get remarried he will still have the right to three divorces — as against talaq in respect of which each talaq reduces the number of talaqs he is entitled to pronounce in all.

(c) In the case of faskh, even if 'iddat is obligatory a divorce pronounced by the husband during 'iddat will not be effective; whereas in the case of talaq, a talaq pronounced during 'iddat will also be effective.

(d) Three factors make dower mandatory: (i) actual consummation, (ii) presumptive consummation, and (iii) death of either party.

Chapter 2: General Principles of Talaq

DEFINITION OF DIVORCE

Section 1

Talaq literally means to remove a restriction. In the terminology of Shari'at talaq means to put an end to the marriage, with immediate or deferred effect, by using any of the special words meant for it — whether those words are used by the husband himself or by his representative, or by the qazi who in certain situations is regarded by the Shari'at as the husband's deputy and is empowered to pronounce a divorce on his behalf without his consent.

Explanation:

(a) 'special words' mean any word of any language which signifies putting an end to marital relation — whether it literally means that or is customarily used in that sense and is not used in any other meaning, or is an allusion which may have a meaning other than this and its meaning is ascertained with reference to context or intention.

(b) In an irrevocable divorce the woman becomes haram (absolutely prohibited) for the husband immediately; while in a revocable divorce prohibition becomes effective after the expiry of 'iddat.

(c) If the husband delegates his right of talaq to the wife, or appoints some other person as his representative for pronouncing a talaq, both she or he will have a right to pronounce talaq as the husband's deputy.

Essence of Talaq

Section 2

To utter by mouth any of the special words implying talaq is the essence in a talaq. Just thinking of talaq or silently deciding on it will not result into talaq.

Written Talaq

Section 3

Written talaq may have several forms:

(a) Kitabat-e-mustabinah (legible writing) — i.e., such writing on some paper or wall, etc., which is clear and remains intact. It is of two kinds — mustabinah marsumah (formal legible writing), and mustabinah ghair marsumah (informal legible writing).

(b) If a formal divorce-deed or letter is written with a title and the addressee's name, it is called kitabat-e-mustabinah marsumah. If one just writes on a piece of paper or on a wall only "talaq" or "I have pronounced talaq", without relating it to the wife or sending it to her, it will be kitabat-e-mustabinah ghair marsumah.

(c) A kitabat-e-mustabinah marsumah stands for spoken words and effects a talaq. Kitabat-e-mustabinah ghair marsumah will effect a talaq only if the husband says that he intended to divorce his wife through it.

Section 4

Kitabat-e-ghair mustabinah (illegible writing) – A writing which is not express and cannot be read, like writing on water or in the air, will not effect a talaq in any case.

Conditions for Effectiveness of Talaq

Section 5

(a) The man pronouncing a talaq should be sane and adult and should have pronounced the talaq while he was awake and conscious. Therefore, a talaq pronounced by a person who is a minor, insane, imbecile, overwhelmed, delirious, unconscious or asleep, will not be effective.

(b) For the effectiveness of talaq it is, in principle, necessary that the man pronouncing it should be in his senses. This demands that a talaq pronounced in an inebriated condition should not be effective. However, if a person has unlawfully consumed an intoxicant by his own liking and habit, his talaq will become effective by way of punishment. But if a person has consumed any intoxicant as a treatment, or under compulsion or strong pressure, or in ignorance, and pronounces talaq in that state, it will not be effective.

(c) If a person consumes something which in fact is not intoxicating but because of its unsuitability for his system he gets inebriated, a talaq pronounced in such condition will not be effective.

(d) It is also necessary that in the sentence used for talaq the divorce must have been related to the wife, either expressly or by necessary implication.

(e) It is further necessary that the woman divorced should be a proper object of talaq, i.e., she must be either married to the man or observing for him 'iddat of a revocable or irrevocable talaq other than a triple talaq.

Explanation:

(i) The husband must be major. A talaq pronounced by a minor will not be effective.

(ii) Under the Shari'at, age of majority for both boys and girls is fifteen years; but boys and girls who attain biological puberty before that age will be regarded as major.

(iii) The husband pronouncing a talaq must be of sound mind — since sensibility is necessary for the enforcement of any disposition and one who is not of sound mind, e.g., is insane or imbecile, his disposition is devoid of sensibility. It is notable that a mentally weak person who cannot fully appreciate his interest does have a certain degree of sensibility and, therefore, his disposition shill be enforced. Insanity is a state of mind due to which the man cannot differentiate between good and bad and does not have an eye on the consequences of his action. There are many kinds and situations of insanity. Among these is also imbecility. The difference is that an imbecile person does not use foul language. A person in delirium also loses his senses. During fainting and unconsciousness though intellect remains but is so overpowered that it becomes ineffective. A state of scare and fear in which a man loses his intellect is also covered by it, and a talaq pronounced in such condition does not become effective. Similarly, anger of extreme degree in which intellect is overpowered and the man cannot understand what he is saying and doing is also a condition in which a talaq will not be effective.

(iv) Intoxicants are strictly prohibited in Islam. Therefore, if a person consumes an intoxicant and pronounces a talaq in that condition, although he is devoid of senses his talaq will be effective. But if in ignorance or due to extraordinary compulsion somebody consumes an intoxicant, in such special situations he will not be a sinner and a talaq pronounced in such condition will not be effective. Such a state of intoxication may be of various kinds:

(a) an intoxicant may have been used by way of medicine and treatment;

(b) somebody who is starving to death and has nothing else to eat for saving his life may in a state of constraint consume an intoxicant;

(c) somebody may be compelled to consume an intoxicant by making him strongly believe that if he does not do so he will suffer severe physical injury or some other unbearable harm;

(d) somebody might consume a thing which is not known to him to be an intoxicant; he may have taken it by chance and got intoxicated.

In all such conditions if a person pronounces a talaq it will not be effective.

Section 6

If a person under compulsion or duress pronounces a talaq it will be valid if it is verbal, but not otherwise.

Section 7

A talaq pronounced in hazl, i.e., jest, also becomes effective.

Section 8

If a sick person has pronounced a talaq in his senses, it will be effective.

Section 9

A talaq pronounced in anger becomes effective. However, if the anger is of such a degree that the man loses his senses and is not even able to comprehend what he is uttering, a talaq pronounced in such a state will not be effective.

Section 10

If a dumb person divorces his wife (sarih, bainah or mughallazah), or signs on the divorce-deed after knowing its contents, the talaq will be effective. If he cannot write, his special gestures (which people close to him know and understand) may effect a talaq; and the number of talaqs pronounced will also be determined by signs.

Chapter 3: Proper and Improper Talaq

Section 11

There are two conditions for talaq-e-sunnat [proper talaq] first, in a consummated marriage the wife should not be divorced during menstruation and the talaq should be pronounced in a tuhr (period following one menstruation and preceding the next) before having coitus in it. Second, if the marriage has been consummated, only one revocable divorce should be pronounced in any single tuhr. If a man pronounces a single revocable talaq in a single tuhr and keeps away from the woman till her 'iddat is over, this will be talaq-e- ahsan (better divorce). If a single revocable talaq is pronounced before coitus in a new tuhr till three talaqs are over, this will be talaq-e- hasan (good divorce). Similarly, in a non-consummated marriage pronouncing a single talaq even though when the wife is in menstruation will be

talaq-e-hasan. Pronouncing three talaqs in three months on a minor or a woman past menopause is also talaq-e-hasan.

Section 12

Talaq-e-bid'at [improper talaq] includes: in a consummated marriage divorcing the wife during menstruation, or divorcing her in a tuhr after coitus, or pronouncing an irrevocable divorce, or pronouncing more than one talaq in a single tuhr — and in an unconsummated marriage pronouncing together more than one talaq, or pronouncing more than one talaq in a single month on a minor or woman past menopause.

Section 13

Tataq-e-bid'at is prohibited; but if a person pronounces such a talaq it will be effective while the man will be guilty of a severe sin.

Chapter 4: Express Talaq

Section 14

An express talaq is one which is pronounced by such a word which is used only to mean a divorce; and if it has any other meaning it should have been abandoned.

Rule of Express Talaq

Section 15

The rule of express talaq is that it will effect a divorce even without intention.

Section 16

Express words effect a revocable talaq; but in the following cases it will be irrevocable:

(i) Where by express words a wife is divorced before consummation even if khalwat has taken place; and

(ii) Where the express words are qualified by some adjective implying severity of the talaq pronounced and an imminent termination of the marital bond.

Explanation

E.g., when a person says to his wife “I divorced you absolutely”, “divorced irrevocably”, “divorced like a mountain”, “divorced in the worst form”, “divorced in the strictest form”, etc.

(iii) Where divorce is for a consideration.

Explanation:
E.g., if the husband tells his wife "I divorced you in return for ₹ 1000" and the wife accepts it, an irrevocable talaq will be effective.

(iv) Where the express divorce follows two other talaqs, or three talaqs are pronounced together by express words or by gesture.

Explanation:
E.g., if a person who has already pronounced two talaqs pronounces a third and tells his wife "I gave you three talaqs", or "I gave you so many talaqs" showing three fingers so as to fix the number— in such cases the talaq will be irrevocable, and since there have been three talaqs, it will also be mughallazah (leaving no room for a remarriage straight away).

(v) Where a talaq in express words is pronounced during 'iddat following an earlier irrevocable talaq.

Rule of Revocable Talaq

Section 17
In a revocable Talaq the husband can take back the wife during 'iddat without her consent and without a remarriage; but after the expiry of 'iddat she will become irrevocably divorced and can be lawfully taken back only by a fresh marriage.

Mode of Revocation

Section 18
Revocation may be either by conduct – e.g., if the husband has had coitus, kissing and caresses with the wife — or by spoken words, e.g. if the husband says that he has taken back his wife and informs her of the same. Revocation by words is preferable in the presence of witnesses (two men or a man and two women).

Rule of Irrevocable Talaq

Section 19
An irrevocable talaq, whether express or implied, (words of implication are explained hereinafter) is of two kinds: bainunat-e-khafifah (minor separation) and bainunat-e-ghalizah (major separation). Less than three talaqs effect bainunat-e-khafifah, otherwise there will be bainunat-e-ghalizah.

Section 20
In bainunat-e-khafifah though the wife goes out of the marital bond but the parties may by mutual consent remarry during or after the 'iddat. In bainunat-e-ghalizah remarriage is

possible only where after the expiry of 'iddat the woman has married another man who has either died or divorced her and the 'iddat of death or divorce has expired.

Miscellaneous Rules of Talaq

Section 21

If before the consummation of marriage, actual or presumptive, three talaqs are pronounced the wife will become irrevocably divorced by the very first of these, and the remaining will be meaningless since the woman is no more an object of divorce. However, if he says "I divorced thrice", all three talaqs will be effective.

Section 22

If the husband addresses the wife as "divorcee" and says "O mutallaqah", "talaqan", "talaq-yaftah" (all three words mean divorce); if she had been divorced earlier either by her former or the present husband and the husband does not intend to divorce her, no talaq will become effective and addressing her as "divorcee" will be taken as referring to the earlier talaq. If she was never divorced earlier, this would result into a single revocable talaq.

Section 23

If a person specifies the number of talaqs in the sentence used by him for pronouncing them, i.e., one, two or three, as many talaqs will be effective.

Section 24

If a person pronouncing a talaq does not specify a number but repeats the words of talaq, e.g., "I divorced you, I divorced you, I divorced you", or "you are divorced, divorced, divorced", if he admits that by his repetition he wanted to pronounce three talaqs, as many talaqs will be effective. However, if he says that he intended only a single talaq and repeated the words of talaq only to put emphasis and these were not meant to pronounce more than one talaq, his statement on oath will be accepted. But if he says he had no intention at all either of one talaq or of two or three talaqs, it will be seen if there is a customary practice of repeating words on such occasions for giving emphasis, and keeping a margin for the demands of custom the repetition of words will be regarded as emphasis and effect given to a single talaq. It there is no such custom and repetition of words is known and prevalent for giving a new meaning, every word of talaq will be regarded as a regular talaq.

Explanation:

There are two rules in the Shari'at. One "what is proved by custom is like being proved by the texts", i.e. it is necessary to have regard to custom when determining the meaning of anything said. If by custom repetition of words aims at laying emphasis, it will be regarded as such. E.g., if someone says, "I came, I came, I came" or "snake, snake, snake", or "bring

the book, book, book", customarily these words do not signify coming thrice, or three snakes or three books, and indicate stress only. The other principle is that if some word can have multiple meanings, one of these will be fixed by the speaker's intention, and there are precedents for it in the Shari'at, e.g. out of several possible meanings of symbolic expressions one is fixed by the intention of the speaker. The rule mentioned in this Section that intention will determine the number of talaqs is based on this second rule; and the condition of oath in respect of a single talaq is aimed at avoiding accusations.

Section 25

If a wife tells her husband "divorce me, divorce me, divorce me", and the husband says only once "I divorced you", only one talaq will be effective.

Chapter 5: Symbolic Expressions

Section 26

A 'symbolic expression' is a word(s) which does not basically signify a divorce and may mean either a talaq or something else.

Section 27

If a man uses for his wife symbolic expressions of divorce, a talaq will be effective by these words if he intended it, or if there is some context pointing out to a divorce.

Section 28

Those symbolic expressions which are predominantly used for divorce will effect a divorce even without reference to intention or context, e.g., "you are haram (absolutely prohibited) for me".

Section 29

While using symbolic expressions if the husband meant one talaq or two talaqs, a single irrevocable talaq will take effect. But if he meant three talaqs, a talaq-e-mughallazah (divorce leaving no chance for direct remarriage) will take place.

Rule of Successive Talaqs

Section 30

If a talaq is expressly pronounced (whether it is irrevocable or revocable) and then another talaq is pronounced during 'iddat, it will be effective.

Explanation:

E.g., a person said, "I gave worst talaq" and then said at the same time or later during 'iddat "I gave worst talaq";

or first said “I divorced” and then again “I divorced”;

or first said “I gave strictest talaq” and then “I divorced”;

or said “I divorced” and then “I gave strictest talaq”;

in the first, third and fourth cases there will be two irrevocable talaqs, while in the second case two revocable talaqs will be effective.

Section 31

If an irrevocable talaq given through a symbolic expression is followed by another talaq given by express words during ‘iddat, it will take effect.

Explanation:

E.g., if a person says when divorce is being talked about, or with the intention of divorce, “you are separated from me” and says again either then and there or later during 'iddat “I divorced you” or “I gave you a mountain-like talaq”, in either case two irrevocable talaqs will be effective.

Section 32

If a revocable talaq effected by express words is followed within 'iddat by a symbolic expression of divorce, an irrevocable talaq will take place.

Explanation:

E.g., if a person said “I divorced you” and then at the same time or during 'iddat said “I separated you”, the first utterance effected a revocable and the second an irrevocable talaq, and after the latter there is no right of revocation.

Section 33

An irrevocable talaq effected by express words cannot be followed by such a talaq by symbolic expression, except when the said expression is coupled with a word denoting a new talaq in which case by a symbolic expression too a second or third talaq during ‘iddat may by effective.

Explanation:

E.g., if a person says “I gave you worse talaq” and then “you are separated from me”, there will be a single irrevocable talaq; but if he says “I gave you worst talaq” and then at the same time or during ‘iddat “I separate you afresh”, there will be two irrevocable talaqs.

Section 34

An irrevocable talaq effected through a symbolic expression cannot be followed up by another such talaq, by using either the same symbolic expression or a different one.

However, if the later symbolic expression is coupled with a word denoting a new talaq, it will effect a new irrevocable talaq within 'iddat.

Explanation:

E.g., if during the talk on or with the intention of divorce a person says “I separated you” and repeats the word at the same time or later during 'iddat, there will be a single irrevocable talaq; but if he first said “I separated you” and later “I separated you afresh”, there will be two irrevocable talaqs.

Chapter 6: Delegation of Talaq

Section 35

A man entitled to pronounce a talaq may entrust this entitlement of his to others. If he authorises his wife to divorce herself, or some one else to divorce her if he so wants, this is called delegation. And if he directs another sane and adult person to pronounce divorce, giving that person no option in the matter, this is appointing a representative for divorce. If this transfer of entitlement in either case is accompanied with the use of the word talaq, the delegation or appointment of representative will be express; if it is with the use of a word which does not expressly means a talaq, the husband’s intention will be decisive.

Section 36

If the husband has not authorised the wife for good and has also not fixed a duration, the wife’s option to accept or reject the delegation will be limited to that occasion only; while if he has appointed a representative, even if for good, he will have the authority to pronounce a talaq until the husband dismisses him. If the husband authorises the wife for good, e.g., if he has said “you may divorce yourself whenever you want”, the wife will, even if she has rejected it, always have the authority to divorce herself. However, if the husband has fixed a duration, she can divorce herself till its expiry only.

Section 37

The wife or the representative can pronounce lesser number of talaqs than authorised for by the husband; but not a larger number.

Section 38

If the wife or the representative in one go pronounces a larger number of talaqs than authorised for, no talaq will take effect and the authority will abate.

Section 39

A talaq pronounced by the wife or the representataive will take the form only as authorised by the husband.

Explanation:

E.g., if the husband has given the right to pronounce an irrevocable talaq and the wife or the representative pronounces a revocable talaq, it will be regarded as irrevocable; and if he has given the right of a revocable talaq and they pronounce an irrevocable one, it will be revocable and not irrevocable.

Section 40

If the husband while delegating the right to divorce or appointing a representative for it has mentioned the number or kind of talaqs but has also subjected it to their will, it will be necessary to have regard to the specified number or kind; if this is not done there will be no divorce.

Explanation:

E.g., if the husband told the wife, or the representative, "If you want you may give yourself (or my wife) three talaqs, or an irrevocable talaq", and they pronounce only one or two, or a revocable one, this action will be futile and no talaq of any kind will be effective.

Section 41

If the husband authorises a person to effect a talaq without subjecting it to his will, the authority will be permanent though the husband can revoke it at any time. If he has subjected the authority to the will of the representative, he will have the authority to effect a talaq only on that occasion, and not later; and for that occasion the husband cannot dismiss him.

Section 42

Delegation of divorce cannot be revoked by the husband.

Section 43

If the husband has made the delegation for a fixed period and the wife does not effect a talaq until that period expires, the delegation will abate.

Section 44

If no duration has been fixed for the delegation and the wife has rejected it on the same occasion, or the wife's situation changes before she effects a talaq, in either case the delegation will abate.

Explanation:

Husband's own right of talaq does not end by delegation or appointment of a representative.

Chapter 7: Contingent Talaq

Section 45

Making effectiveness of a talaq dependent on an act or omission in future is called ta'liq-e-talaq (suspension of divorce).

E.g., when the husband tells his wife “if you do not say namaz (prayers) you are divorced”, or “if you do not come to my place by 5 p.m. today you are divorced”.

Conditions for Validity and Effectiveness of Ta'liq

Section 46

(a) Sanity and majority of the husband;

(b) talaq should have been made contingent on something which is now non-existent but is likely to be found in future;

(c) In the words of talaq there should be approximation of the contingency and its effect;

(d) Talaq should not be suspended on the will of some one whose will it is impossible to know;

(e) At the time of talaq the woman concerned should be his wife or divorced wife in 'iddat, or if she is yet to be married to him talaq should be made contingent on marriage;

(f) The conditional sentence should have no meaning other than making talaq contingent.

Explanation:

As regards (b):

For the validity of a contingent divorce it is necessary that the contingency should now be non-existent and its existence in future should be possible. If a talaq is subjected to something which is existent there will be an imminent talaq; and if it is subjected to a condition which is improbable, the action will be ineffective and no talaq will take place. If it is possible for the contingency to happen in future, a talaq will take place when it happens.

As regards (c):

If in the words of divorce, between the clauses of contingency and its effect something irrelevant is said, or a long silence intervenes which is not habitual, or the occasion changes, this will not be the case of a contingent talaq, and an imminent talaq will take place.

As regards (d):

E.g., if a person says in-sha' Allah (if God so wills) in continuation of the words of talaq, it will not be a contingent talaq and no divorce will take place. But, if it is said about another human being whose intention can be known, that if he wants he may pronounce a divorce, this will not be a meaningless statement. However, in jurisprudential terminology it will be called tafwiz (delegation) of divorce, not ta'liq (suspension) of talaq.

Chapter 8: Rules of Zihar

Section 47

Zihar literally means positioning or joining back to back. In the Shari'at, comparing the wife or any of her organs which may signify her whole being with women who are permanently in the prohibited degrees of marriage, or with any of their such organs to see which is absolutely prohibited, is called zihar.

Elements of Zihar

Section 48

(a) husband's sanity and majority;

(b) to compare the whole person of the wife or any such organ of hers which can signify the whole;

(c) comparison with any of the female relatives prohibited for marriage to him, or with any such organ of hers to see which is absolutely prohibited for him;

(d) express mention of a word of comparison, e.g., misl, tarah, jaise, (all meaning "like").

Explanation:

Out of the aforestated elements the most important is (d), otherwise the words will be regarded as meaningless. E.g., if a person tells his wife "you are my mother" or "my mother's back", it will be absurd. If comparison has been made with such an organ of a female relative permanently prohibited for marriage seeing which is absolutely prohibited, e.g., "you are like my mother's back", it will be express zihar. If comparison has been made with the whole being of such a woman, e.g., if one tells the wife "you are like my mother", this will be symbolic zihar, as it may mean zihar, ila or similarity in respect and reverence. The effect will be in accordance with the intention, so much so that if the husband says he meant similarity in respect and reverence, it will be accepted. But if such a sentence is spoken while divorce is being talked about, or during a quarrel, intention of respect and reverence will not be admissible in evidence in a court.

Effects of Zihar

Section 49

Zihar does not effect a divorce, but unless the husband undertakes expiation for zihar, cohabitation with the wife will be absolutely prohibited.

Section 50

if the husband does not cohabit with the wife due to his failure to expiate for zihar, the wife can through the qazi compel him either to expiate or to divorce her.

Section 51

Expiation for zihar is continuous fasting for two months without including in it the month of Ramazan and those five days fasting on which is prohibited. If Ramazan begins or the 10th of Zil-Hij arrives while the man is expiating for zihar, he will have to expiate afresh in full. For a person who is not capable of fasting, the expiation is to offer middle-standard food to sixty indigent persons or the prescribed measure of wheat or its value to each of them.

Chapter 9: Rule of Li'an

Elements of Li'an

Section 52

If a husband accuses his chaste Muslim wife of adultery and fails to furnish four eye-witnesses, and the wife applies for li'an to the qazi, there will be no li'an if the wife admits adultery or the husband admits that his accusation is false. However, if the husband stands by his accusation and the wife standing by her denial demands li'an, the process of li'an shall be followed.

Section 53

The process of li'an begins with the husband swearing four times before the qazi so as to say thrice “I swear by God in witnessing that I am truthful in my accusation of adultery against the wife”, and then the fifth time “God’s curse be on me if I am a liar”. Next the woman is to say four times “I swear by God in witnessing that my husband is lying in accusing me of adultery” and then, the fifth time, “God’s wrath befall me if my husband is truthful in what he says”.

Section 54

After the aforestated mutual swearing the qazi will effect separation between the parties, and it will amount to an irrevocable divorce.

Conditions for Obligatory Li'an

Section 55A

After the accusation of adultery the following conditions will make li'an obligatory: (i) sanity and majority of both the husband and the wife, (ii) neither of them should have ever faced the Qur'anic punishment for false accusation; (iii) existence of a valid marriage between them, (iv) chastity of wife, and (v) the country being a Dar-ul-Islam.

Explanation:

Qur'anic punishment means that either party had ever accused anybody of fornication but failed to prove it for which reason he or she had been sentenced to the Shari'at-ordained punishment for false accusation. If either the husband or the wife has earlier undergone punishment for false accusation, there will be no li'an. Also if their marriage is irregular or if the wife has been irrevocably divorced, there will be no li'an. Chastity of the woman here means that she should be tree from fornication, sexual relation in marriage under a mistaken belief in its validity, or consummation of an irregular marriage.

Effect of Li'an

Section 55B

If after the parties are separated following li'an the husband stands by his claim and the wife by her denial, they cannot remarry. However, if after separation the husband withdraws his claim or the wife withdraws her denial, they can remarry.

Section 56

If after the li'an the woman's adultery with some other person is proved, or if the husband accuses someone else of fornication and fails to prove it, in either case the effect of li'an will end and it will be lawful for them to remarry.

Chapter 10: Rules of Ila

Section 57

If a man takes a vow not to cohabit with the wife for four months or more or for an unspecified duration, or subjects cohabitation to the condition of his doing something which is very difficult in itself, it is ila.

Explanation:

Ila also takes effect by swearing not to cohabit with the wife, e.g., if one says "By God I will not cohabit with you for four months". Similarly, subjecting cohabitation to performing an act which is usually very difficult also effects ila, e.g., if one says "if I cohabit with you it will be obligatory for me to perform Haj or observe fasts for a month, etc. However, if one mentions a condition fulfilling which is not usually very difficult,

there will be no ila, e.g., if one says “If I cohabit with you I will be obliged to say four rak'ats of namaz or fast for a day”.

Conditions for Effecting Ila

Section 58

(i) sanity and majority of the man effecting ila;

(ii) the wife being married to the husband, in fact or in law, at the time of ila;

(iii) if ila relates to a non-wife, making it dependent on the man’s marriage to her;

(iv) not limiting non-cohabitation to a specified place; and

(v) not making exception of any day out of the four months

Explanation:

(a) If the husband is not sane and major, the ila by him will have no effect.

(b) It is necessary for the validity of ila that it should relate to the woman married to the man in fact or in law. While being married in fact is clear; being married in law refers to a woman observing 'iddat after having been revocably divorced by the man. If the 'iddat prolongs so that the duration of ila expires before the 'iddat ends, an irrevocable divorce will be effective. There can be no ila relating to a woman who is observing 'iddat following an irrevocable divorce (leaving or not, scope for a direct re-marriage), since she is not married to the man either in fact or in law.

(c) If somebody says to a woman “If I marry you by God I will not cohabit with you for four months”, ila will be effective as soon as the marriage takes place.

(d) If a person tells the wife “By God I will not cohabit with you in that particular place”, this will not be ila.

(e) If someone tells his wife “By God I will not cohabit with you for four months except one day, this will not be ila.

Section 59

Ila is of two kinds, viz., temporary ila, i.e., to vow against cohabitation with the wife for a fixed period (which should be at least four months), and permanent ila, i.e., to vow so without fixing a duration, or for good.

Section 60

In a temporary ila cohabitation within four months makes obligatory for the man either an expiation or the performance of the difficult action to which cohabitation was subjected by

him. If there is no cohabitation for four months, at the expiry of this period an irrevocable talaq takes effect. In either case the ila will come to an end.

Section 61

In a permanent 'ila if the husband cohabits within four months expiation becomes obligatory and ila ends; and if he does not, there will be an irrevocable divorce but the ila will not end for the purposes of divorce. If now after halalah the man remarries her, non-cohabitation will not lead to a talaq but cohabitation will make expiation obligatory.

Section 62

In respect of ila every such word will be regarded as express which straight away points out to giving up cohabitation; while words which are not of this nature will be regarded as symbolic and their effect will depend on the husband's intention. If he meant by these, withdrawal from cohabitation it will effect an ila, but not otherwise.

Section 63

If a person wishes to revoke an ila and is capable of having sex, he can resume cohabitation; this will make expiation obligatory and put an end to the ila. If one is capable of having sex, revocation by word of mouth will not be enough. If a person is unable to have sex due to a temporary or permanent sickness, or for any other strong preventive reason, oral revocation will be enough. No talaq will take effect and no expiation will become obligatory.

Chapter 11: Rules of Khula'

Section 64

Termination of marital relation by the husband in consideration for a return agreed upon by the parties is khula', whether it is through the word khula' or by mubara'at, or by the word talaq or any of its synonyms.

Explanation:

Khula' is an agreement of a sort in which the husband puts an end, for a stipulated return, to his rights arising from marriage and is, therefore, like an irrevocable talaq, and since the return in it is to be paid by the wife her consent is necessary. The offer of khula' may emanate from either side, e.g., if the husband says "I gave you khula' in return for dower" and the wife says "I accepted". Or the woman says "Give me khula' in return for dower", and the husband says "I gave khula'". Sometimes this action takes place through the word mubara'at, i.e., the man would say "I relieved you of marriage on the condition that you exonerate me of all your rights" and the woman "I exonerated". Sometimes words of talaq are used, e.g., the husband says "I divorced you in return for ₹ 2000", and the wife "I accepted". Thus, in the aforementioned definition of khula', a khula' by the word khula',

khula' by the word mubara'at and khula' by the words divorce for consideration, all are included.

Section 65

In a khula' only those rights will abate and only that return will be due, the abatement and payment of which has been agreed upon.

Section 66

In a khula' if the woman expressly forgoes maintenance for 'iddat it will abate, but the right of residence during 'iddat and children's maintenance will not abate even if it is so agreed upon.

Section 67

Whatever amount of return is agreed upon in khula' will be lawful. However, to fix a return exceeding the amount of dower, or to take it, is undesirable.

Chapter 12: Rules of Faskh and Tafriq

Section 68

Separation means putting an end to marital relation. In the following cases a decision of the qazi is required for separation between the parties:

(i) marriage to a non-equal; (ii) dower being excessively low; (iii) option of puberty; (iv) husband's failure to fulfill marital obligations; (v) husband's incapability to have sex; (vi) husband's infliction with leprosy, leucoderma or a similar offensive disease; (vii) husband's insanity; (viii) husband's whereabouts being unknown; (ix) desertion by husband; (x) husband's failure to provide maintenance despite capacity; (xi) husband's inability to provide maintenance; (xii) husband's physical cruelty with wife; (xiii) existence of a serious discord between the parties; (xiv) husband having married the woman by deception regarding his condition; (xv) separation due to bar of affinity; (xvi) separation due to the marriage being irregular.

Marriage to a Non-Equal

Section 69

Marriage to a non-equal may fall in any of the following different situations, in the first two of which marriage will take place and remain binding; while in the last two it will not take place at all:

(a) When the father or the grandfather, in his full senses and acting as an absolute well-wisher and a far-sighted and God-fearing person, and keeping the interests and welfare of

the minor in mind, contracts the minor into marriage to one who is his or her non-equal in social status.

(b) Where a major boy marries someone who is much below his social status.

(c) Where a guardian other than the father and the grandfather contracts a minor boy or girl into marriage to someone not equal to them in social status.

(d) Where the father or the grandfather, without keeping in mind the minor's interests and welfare due to his shamelessness, negligence or greed, etc. or in a state of drunkenness, contracts him or her into marriage to a non-equal.

Section 70

In the following cases there will be a right to separation on account of non-equality:

(a) If a major girl without her guardian's consent marries a non-equal, her agnatic guardian will have a right to seek separation.

(b) If a major girl and her guardian both have contracted the marriage on the condition of equality of parties, or have done so believing the husband's statement claiming to be an equal, and later it transpires that he is a non-equal, in either case the girl and the guardian both will have an 'option of equality' and can seek dissolution of marriage by the qazi.

(c) If the father or the grandfather contracts a minor into marriage on the condition of equality or believing in the other party's statement about equality, and later the opposite of it is found, the father or the grandfather will have a right to seek separation by the qazi on the ground of non-equality. If they have not given consent, due to non-equality, before the minor attains majority, on becoming major the minor also can seek separation by the qazi on account of non-equality.

(d) The right to separation on the ground of non-equality lasts only till the wife conceives or delivers a child.

Excessively Low Dower

Section 71

If a major girl without the consent of her guardian contracts a marriage for a dower which is much below the proper dower, the agnatic guardian will have a right to demand its enhancement up to the proper dower, and to seek separation by the qazi if the husband is not willing to accept it.

Option of Puberty

Section 72

If a guardian other than the father or the grandfather contracts a minor boy or girl into marriage to a non-equal, on becoming major they will have the option either to remain in marriage or to get it dissolved by the qazi.

Husband's Failure to Fulfill Marital Obligations

Section 73

Abstaining from sex and keeping the wife in an uncertain position is also one of the grounds of separation, since fulfilling marital obligations is mandatory. Not fulfilling them and keeping the wife in uncertainly is cruelty and its redressal is qazi's duty. Further, in such a situation the woman may also possibly indulge in sin; and the qazi has a duty to close such possibilities. So, if the woman approaches the qazi with the aforesaid complaint, after ascertaining the facts the qazi will have to provide relief against cruelty and to create opportunities for avoiding sin. In the Maliki law, too, abstaining from sex is a ground for separation.

Husband's Incapability to Have Sex

Section 74

Husband's incapability to have sex may have different forms, e.g., where he has no male organ or has one of too small size, or cannot use it due to some disease. In all such cases there will be an option to get the marriage dissolved by the qazi. In the first two situations the qazi will put an immediate end to the marriage; while in the third he will allow one lunar year for treatment and if despite such treatment the husband remains incapacitated, on the wife's demand he will immediately dissolve the marriage.

Husband's Infliction with Leprosy, etc.

Section 75

If the husband has been inflicted after marriage with leprosy, leucoderma or another such offensive disease, on the woman's application the qazi shall, after ascertaining the facts and taking evidence recognized by the Shari'at, allow the husband one lunar year for treatment, and if it is not cured even after this and the wife again demands separation, he will dissolve the marriage.

Explanation:

If the husband was inflicted with these diseases before marriage and the wife knew of it before marriage but yet married him, she will have no right now to claim separation.

Husband's Insanity

Section 76

Such insanity of the husband which can be prejudicial to the wife's life or limbs will be a ground for separation. However, the qazi will allow the husband one year for treatment; if he is not cured even after this and the wife wants separation, the qazi will effect separation.

Husband's Whereabouts Being Unknown

Section 77

A person who has disappeared is regarded of unknown whereabouts if nothing is known about him and there is no news of his life or death. If a woman's husband is so missing, she has an option to get her marriage dissolved by the qazi.

Explanation:

In such a situation the woman shall furnish proof of her being married to the man and of the man being of unknown whereabouts Thereupon the qazi will first have him fully searched for and enquired about. If there is no news, and it is proved in the Shari'at-prescribed manner that there is no arrangement for the woman's maintenance, or that there is a strong risk of her indulging in sin, after one year on her demand the qazi shall dissolve the marriage. This dissolution will be regarded as a revocable talaq. However, if her maintenance can be arranged out of the husband's property or she can arrange for her own maintenance, and there is also no risk of her indulging in sin, the qazi will after the search and inquiry direct her to wait for four years. If the missing man turns up during the period the qazi will dismiss her claim; otherwise he will on the woman's demand order separation and permit her to remarry after observing 'iddat for four months and ten days.

Desertion by Husband

Section 78

Ghaeb ghair-mafqud (deserter) is a person about whom it is known that he is alive but not where he is, or it is known where he is but he neither comes to the wife nor sends for her nor provides her maintenance, thus causing severe hardship and misery to the woman To get rid of such a cruel husband she can apply to the qazi for separation. On receiving the application:

(a) The qazi shall direct the wife to prove through witnesses and by oath her marriage to the deserting husband and the fact that he is legally bound to provide maintenance but has made no arrangement for it either before or after going away, and also that she has not agreed to forego it.

(b) After the proof of marriage and of the man's obligation to provide maintenance, the qazi shall direct the man to return and fulfil the wife's demand, or send for her (provided

that there is no risk in her going to him), or provide or arrange for her maintenance, or else to divorce her, warning him that if he does not act on any of these options he will dissolve the marriage by his own order.

The qazi will send this order to the man through two reliable persons and after reading it out to them and entrusting it to them, asking them to take it to him and seek his response, preserve well whatever reply – oralor written, positive or negative – he gives so that on return they can give evidence of his reply (oral reply should better be recorded for the purpose of evidence), and if he gives no reply to report the same. If the man lives in such a place to send messengers where is extremely difficult, the order may be sent by post. Thereafter, unless complying with the qazi's order the husband begins providing maintenance to the wife, or some relative or neighbour or stranger ensures her maintenance, the qazi shall after allowing another reprieve for a month or more at his discretion order separation on the woman's demand. This separation will be regarded as a revocable talaq.

HUSBAND'S FAILURE TO PROVIDE MAINTENANCE DESPITE CAPACITY

Section 79

If the husband does not provide wife's maintenance despite having capacity to do so, nor can the woman herself arrange for her maintenance preserving her dignity and honour, nor is any other person to act as surety for her maintenance, or if it may be possible to arrange maintenance with some difficulty and trouble but due to separation from the husband there is a strong risk of indulging in sin, and the husband does not agree also to talaq or khula', in such compelling circumstances the wife can apply to the qazi for separation. The qazi will enquire into the matter fully through evidence, etc. and if the woman's claim is proved, order the husband either to fulfill her demand or divorce her — warning that otherwise the qazi will dissolve the marriage. If the husband does not act either way as directed, the qazi will effect separation; and this will be regarded as a revocable talaq.

HUSBAND'S INABILITY TO PROVIDE MAINTENANCE

Section 80

If due to poverty (not caused by negligence) the husband is unable to provide maintenance, the qazi will first give him a proper reprieve. If even thereafter the woman remains deprived of maintenance, and all the manners prescribed by the Hanafi law for arranging the woman's maintenance are either impossible to be acted upon or fail, while the qazi feels in view of the circumstances that being deprived of maintenance may not only cause grave injury to the wife but may also lead her to temptation, he can on her demand dissolve the marriage.

Grave Cruelty to Wife

Section 81

If the husband rebukes the wife, or hurls such abuses on her as may cause her extreme disdain or torture, or inflicts grave physical cruelty on her, she will have a right to separation.

Explanation:

This is in accordance with the Holy Qur'an (II:231), teachings of the Holy Prophetﷺ, and the Islamic injunction against inflicting injuries to anybody. The qazi will, after ascertaining the facts, give a suitable decision. He may admonish the husband, acquit him on furnishing a bond, or effect separation between the parties.

Discord Between Parties

Section 82

If the parties develop severe abomination so that it seems impossible to lead the married life in keeping with the limits of God, in such a situation:

(a) The qazi will first appoint arbitrators to effect a reconciliation.
(b) If despite arbitration no reconciliation or agreement on separation by mutual consent is arrived at, the qazi can on the woman's demand effect separation on the ground of mutual discord.

Explanation:

If the parties develop differences and a serious discord, i.e., if for some reason they come to have such abomination for each other that it leaves no room for normal cohabitation, initially an attempt will be made to effect a reconciliation and arbitrators will be appointed for it. The arbitrators shall try to remove the mutual abomination or to make the parties agree to separation. If they fail in this effort, separation will be effected through the qazi.

It is notable that God's injunction is for normal cohabitation for which mutual love is necessary. There will be no room for normal cohabitation if the parties begin to hate each other. If either party begins to hate the other, this too will be regarded as discord as the willingness of both is necessary for normal cohabitation and lack of love and willingness on one side too is enough to end normal cohabitation. So, if both hate each other, or if for whatever reason the wife has a severe abomination, the qazi should appoint arbitrators to attempt a reconciliation; and if despite these efforts no reconciliation is possible and the marriage becomes devoid of its objects, i.e., normal cohabitation becomes extremely difficult, the husband is liable to "release the wife with grace". And if the husband avoids it, the qazi deputizing for the husband will effect separation.

Marriage by Deception on the Part of Husband

Section 83

If a man has made a misrepresentation about his descent, beliefs or financial condition, i.e., capacity to provide dower and maintenance, and has married by deceiving the girl's side, the girl will have a right to seek dissolution of marriage through the qazi; and the qazi can effect separation on this ground after taking evidence as per the Shari'at.

Separation Due to Bar of Affinity

Section 84

If the wife claims that any of the husband's male ascendants or descendants has touched her with lust, or that the husband has touched with lust any of her female ascendants or descendants, and either the husband affirms this claim, or in the case of his denial the wife proves it by witnesses in the qazi's court, a perpetual bar will be created between the parties.

The husband is in such a case liable to separate from the wife saying "I repudiated you". This in Shari'at is called mutarakat (mutual repudiation). If the husband avoids it despite his admission or wife's evidence of the alleged unlawful act, the qazi deputizing for the husband will effect separation. If the husband does not admit the wife's claim of bar of affinity and the woman could not furnish evidence either, the qazi will dismiss the case.

Explanation:

Whether it was a case of touching "with lust" will be determined in accordance with the detailed rules prescribed by the Shari'at for this purpose (reproduced in the original Urdu version of this Compendium).

Separation Due to Irregularity of Marriage

Section 85

In the case of an irregular marriage mutarakat (mutual repudiation) is obligatory for the parties. If they do not separate, the qazi will effect separation between them.

Explanation:

Mutarakat means either party saying about the other "I repudiated", or using any other sentence of the same meaning.

Cases Not Requiring Qazi's Intervention for Sepdration

Section 86

(i) Husband effecting mutarakat after proof of bar of affinity; (ii) Either party effecting mutarakat in an irregular marriage, (iii) Separation due to ila, (iv) Separation due to husband's apostasy.

Section 87

In the case of bar of affinity mutarakat by the husband is enough to end the marriage.

Section 88

In an irregular marriage mutarakat by either party is enough to end the marriage.

Section 89

If a person effects an ila and does not revoke it within its duration, the marriage will automatically come to an end in accordance with the details stated in the Chapter on ila.

Section 90

If the husband apostates, the marriage ends automatically.

Chapter 13: Rules of 'Iddat

Section 91

The period fixed by the Shari'at for the woman for the termination of the effects of marriage is called 'iddat.

Conditions for the Obligation of 'Iddat

Section 92

In the case of a valid marriage, if separation takes place before actual consummation or khalwat, 'iddat will not be obligatory but if the husband dies it will be obligatory.

Section 93

Khalwat in itself makes ‘iddat obligatory, whether it answers the description of khalwat-e-sahihah or not.

Section 94

In an irregular marriage khalwat or husband's death will not make 'iddat obligatory; in this case only actual consummation will make ‘iddat obligatory.

Duration of 'Iddat

Section 95

'Iddat of death is four lunar months and ten days; and if the wife is pregnant it is till the end of the pregnancy.

Section 96

'Iddat of a divorced woman, if she menstruates, is three complete menstrual courses; and if she does not due to young or old age, it is three lunar months.

Section 97

If the divorced woman is pregnant, her 'iddat is till the end of pregnancy.

Section 98

In an irregular marriage and after coitus under a mistaken belief in its validity 'iddat is three complete menstrual courses; and if there is no menstruation due to young or old age it is three lunar months; while if the woman is pregnant it is till the end of pregnancy.

Section 99

'Iddat begins after dissolution of marriage, talaq, khula', mutarakat or death — whether the wife is aware of it or not.

Section 100

If the 'iddat does not begin on the first day of a lunar month, thirty days will be counted for each month, and in that case total days of 'iddat will be 130 in the case of death and 90 in the cases of divorce, dissolution of marriage and mutual repudiation (mutarakat).

'Iddat Regulations

Section 101

The woman legally bound to observe 'iddat must do so in the house where she had her residence at the time of divorce or separation of any kind. Without an excuse recognized by the Shari'at (as stated in Section 104 below) it is not lawful for her to go out of that house. Moreover, in all cases except those of a revocable divorce it is obligatory for her not to appear before the man and to keep away from him. If it is feared that the man may violate the woman's chastity, the qazi shall order him to remain outside that house.

Section 102

'Iddat of death will also be observed by the woman in what was her residential house at the time of the husband's death. However, if there is no arrangement for her maintenance, or if there is no one to look after her property, she may go out of the house to the extent it is necessary; but she must in any case spend the nights in that house.

Section 103

If the house where 'iddat was to be observed is demolished, or is likely to be demolished, or if the woman lives under great fear in that house, or if it was a rented house and the woman cannot pay its rent, or if the house is divided among the husband’s heirs as his heritable estate and the portion allotted to her is not enough for her, in such compelling circumstances the woman can go out of the house. If she is observing 'iddat for a missing or deceased man, she can shift to any nearby place of her liking. If she is the divorced wife of a person who is present and is observing 'iddat of talaq or any other kind of separation, she will shift to a house chosen by her. In either case the new house will be governed by the rules of the first house (for observance of 'iddat.)

Section 104

During the 'iddat of any kind it is not lawful to propose to the woman observing the same. However, in the case of a woman observing 'iddat of death indicating interest in marrying her, not an express proposal, is permitted. The same is also permitted in the case of a woman observing 'iddat after coitus under a mistaken belief in its validity, unless she is someone else’s wife, or after a consummated irregular marriage.

Section 105

A woman observing 'iddat of death, irrevocable divorce, or any other kind of separation, should keep away from items of adornment like make-up and fancy clothes.

Section 106

For a woman observing 'iddat of an irregular marriage, coitus under a mistaken belief in Its validity or revocable divorce, and for one who is minor or insane, keeping away from adornment is not obligatory.

Chapter 14: Legitimacy of Children

Section 107

The minimum period of gestation is six months, and the maximum two years.

Section 108

If after a valid marriage the wife delivers a child within six months, it will not be the husband’s child of established legitimacy. A child born six months or later will be of established legitimacy; to regard it as of established legitimacy husband’s acknowledgement to that effect will not be necessary. If the husband denies being its father, his paternity of the child will not be derecognized without li'an (mutual imprecation).

Section 109

In an irregular marriage a child born after six months or more from its consummation will be of established legitimacy and for this purpose the husband's acknowledgement will not be necessary.

Section 110

If a woman with whom a man has had coitus under a mistaken belief of its legality delivers a child after six months or more from its date, unless the man acknowledges it to be his child, its descent from him will not be established.

Section 111

If a woman observing 'iddat of a revocable divorce delivers a child before the 'iddat expires as per her admission, it will be regarded as legitimate even if born after two years. If she admits expiry of 'iddat and later delivers a child, it will be of established legitimacy if born within six months, but not otherwise.

Section 112

A child born to a woman irrevocably divorced (whether leaving or not room for a direct re-marriage) after the expiry of six months or more but within two years, while the woman has not yet admitted expiry of 'iddat, will be of established legitimacy. If a child is born after two years or more, it will be of established legitimacy only if the husband acknowledges it; and not otherwise.

Section 113

If a child is born within six months after the husband's death, it will be of established legitimacy. If born within two years it will be of established legitimacy if the woman has not yet admitted expiry of 'iddat — and where she did admit it, only if the child is born within six months.

PART III: LAW OF GIFTS

Chapter 1: General Principles

Section 1

If a person transfers with immediate effect the ownership of his movable or immovable property to another person, and that other person himself or someone else with his consent takes possession of the property gifted, it is called hiba.

Explanation:

(a) The movable property may be a thing or a debt — in either case transferring its ownership will be hiba. Transferring ownership of a thing is clear in its meaning. Transferring a debt takes place when a creditor transfers to a third person the ownership of his debt and enables him to recover the debt and take possession thereof. If the creditor transfers the debt to the debtor himself, this will also be hiba. However, in juristic terminology this is generally called ibra; and revocation of an ibra is not valid.

(b) If the transfer is not immediate and is made contingent on a future event, there will be no hiba. For instance if one says: “if you act so I gift ₹ 100”, or “if Zaid comes tomorrow I gift ₹ 100”, this will not effect a hiba. Or, if someone says “I gift ₹ 100 after my death”, this will be a bequest and not a hiba.

(c) Transfer of ownership may be with a condition that the donee too will in return for the thing gifted gift to the donor a specified thing; or it may be without any such condition; or the donor may say that there will be no return.

(d) Such transfer of ownership may be initial, or may be on the basis that the donee has earlier gifted something to the donor in return for which the donor too is now gifting something to the donee, whether he specifies it in express words to be the return, or the context shows it to be the return.

Section 2

Hiba is a contract which takes effect through offer and acceptance.

Explanation:

Just as any other contract takes place by offer and acceptance, hiba too takes place by offer and acceptance. Both of these (offer and acceptance) are necessary for establishing hiba. Presence of witnesses is not necessary for hiba. The offer will be made by the donor and the acceptance by the donee or his guardian, executor or a representative. In a contract of

hiba actual giving and taking of the property without offer and acceptance will be a substitute for the same.

Section 3

The following are the conditions to make a hiba valid and complete:

(a) The donor should be sane and major and must be the owner of the property which he is gifting.

(b) The thing gifted should be in existence at the time of hiba.

(c) If the thing gifted is divisible, it should be separated and made distinct.

(d) The thing gifted should be such property to benefit from which is lawful under the Shari'at.

(e) The thing gifted should not be accompanied by things not gifted; i.e. should be free from things which have not been gifted.

(f) The thing gifted should come in the possession of the donee himself, or of his representative, guardian or executor.

Explanation:

As regards (b):

The gift of a thing which is non-existent or is legally regarded as non-existent is not valid; if it is gifted there will be no hiba, e.g. coming year's fruit of an orchard, or the ghee that may be churned out of milk, or the oil that may be extracted from sesame seeds.

As regards (c):

'Divisible' means that the thing gifted has the capacity of retaining its real utility even after the division, e.g., a big house or field. 'Indivisible' means that the thing gifted does not have the capacity to retain its real utility after division, e.g., the landing of a house or a handmill.

If a divisible thing, e.g., a field, is gifted before division the hiba will not be complete, but if it is separated and taken possession of during the donor's life time and with his consent, the hiba will be complete. If an indivisible thing, e.g., a small house, is gifted, the hiba will be complete without division.

As regards (e):

E.g., if the house gifted is full of the donor's goods or is occupied by a tenant.

As regards (f):

It is notable that the manner of gifting different things and also of taking their possession will be different. Possession of movable things may be delivered either on the occasion of making the hiba or later. As regards immovable things, there are two possibilities. If the property gifted is not in the donor's possession and use and is in someone else's possession and use, the hiba will not be complete without arranging delivery of possession or, if it is undivided, without partition. In either case the required action should be taken in the donor's life time and with his consent.

Section 4

Every sane and major person can gift the whole or part of his or her property and goods.

Explanation:

However, to gift the whole property so as to disinherit the heirs is a sin.

Section 5

A hiba can be cancelled by the mutual consent of the parties, or by the decision of the qazi; and if the donor takes back the thing gifted by force he will not become its owner.

Section 6

In the following cases revocation of hiba will not be valid:

(a) If the thing gifted is destroyed.

(b) If the thing gifted has gone out of the donee's ownership.

Explanation:

Going out of donee's ownership may have been by sale or gift, or otherwise. Notably, if only part of it has gone out of the donee's ownership, revocation will be valid to the extent of the part remaining in his hands.

(c) If either the donor or the donee dies after delivery of possession [if either of them dies before delivery of possession the hiba will be regarded as void].

(d) If the gift is from one spouse to the other [even if they are later separated].

(e) If the gift is to a relative by blood within the prohibited degrees of marriage.

(f) If after the thing gifted has passed to the donee's ownership its nature has changed, or there has been an inseparable addition to it, whether due to the donee's action or for some other reason — e.g., if Zaid gifts a land to Bakr and Bakr builds a house or grows a garden on it, or if one has gifted cloth and the donee has sewn or coloured it, there will be no right to revocation. Similarly, if someone gifts a cow and it has become very healthy due to the donee's lavish feeding, the donor cannot take it back.

(g) If it is hiba bil-'iwaz or hiba bi shart-il-'iwaz.

Explanation:

If a person gifts some property (movable or immovable) to some body with a condition for return, or without it, and the donee or some one else on his behalf gives the donor some other thing by way of return, and both have taken possession, either party can no more revoke the hiba.

(h) A hiba to an indigent or needy person is legally a sadqah (charity), and its withdrawal is not lawful.

Section 7

In the cases in which revocation of hiba is not valid, the qazi also cannot give a decision allowing revocation.

Section 8

In the cases in which revocation of hiba is not valid, withdrawal by mutual consent will not be treated as revocation or termination of hiba; it will be regarded as a regular hiba to the donor.

Chapter 2: Objects of Gift

Section 9

Imposing such a condition in a hiba which is repugnant to the donor’s proprietary authority will be absolutely of no effect.

Explanation:

E.g., Zaid says “I gift ₹ five hundred to you but do not spend them on clothes”. The condition of not spending the gifted money on clothes will remain wholly ineffective; the hiba will be complete after possession and the donee can use the money as he likes.

Section 10

If after the hiba the donor prevents the donee from taking possession of the thing gifted, the donee cannot take possession of it any more, even on the occasion when the hiba has been made.

Section 11

Nobody has the right to gift the property or goods of a minor.

Section 12

If the father of a minor or another guardian or executor acquires goods and property and says that he has acquired it for the said minor, this statement in itself will effect a hiba in favour of the minor.

Section 13

If something is jointly owned by several persons and all of them gift it to a particular person without partition, it will be a valid hiba.

Explanation:

E.g., a house owned by two persons is gifted by both of them to a certain person. It is a valid hiba.

Section 14

Gifts presented on the occasion of marriage to the parties by the relatives and friends are in the nature of hiba; they belong to the party to whom they are given The jewellery and other things given to the bride by the parents or the groom are the bride's property, if these have not been merely lent to her. Things or cash given to the groom on demand or regarded by custom as necessary in marriage are in the nature of bribery, not hiba. Therefore, these will not be the groom's property. It is unlawful to take them, and obligatory to return them. Similarly, if in some region girl's guardians take from the groom some money or things in addition to dower and maintenance of the bride, in consideration of marriage, this too will be a bribe.

Explanation:

On some occasions it is not specified while giving and taking things whether these have been gifted or lent or, if these are hiba, as to who is their donee. The custom of different regions is different in this respect. In such circumstances each case will be decided in the light of local custom.

PART IV: LAW OF BEQUESTS

Chapter 1: General Principles

Definition of Bequest

Section 1

If a person transfers the ownership of his property or its usufruct or income, to be effective after his death, in favour of another person without consideration, it is a "bequest".

Explanation:

(a) The transfer of ownership may be either for all times to come or for a fixed duration. E.g., a person may say in his will "after I die you will live in my house for two years"; or "after my death my land herein specified shall be given to the poor for good".

(b) The transfer of ownership may be either absolute or subjected to a condition; e.g., if a person says "my house specified herein is bequeathed to you after my death", this will be an absolute bequest. Or, if someone says "I bequeath to you after my death my house herein specified if you perform Haj next year", this will be a conditional bequest and if the legatee performs Haj he will become the owner of the bequeathed house after the legator's death.

(c) One who makes a will is called the musi (legator), the person in whose favour it is made the musa lahu (legatee), and the thing bequeathed the musa bih (object of bequest).

Section 2

A bequest has two constituents — offer by the legato and acceptance, or some action signifying acceptance, on the part of the legatee.

Explanation:

Notably, legatee's acceptance — express or by silence, etc. — will be valid only if given after the legator's death. Acceptance of a bequest given by the legatee, in whatever form, during the legator's life time will not be effective for implementing the bequest.

Conditions for Bequest

Section 3

(a) The legator must be sane and major.

(b) The whole of the legator's property must not be encumbered by debts.

(c) The legator should not have made the bequest under compulsion or duress, or in a light vein, or by slip of tongue.

(d) The legatee must be in existence, in fact or in law, both when the will is made and when the legator dies.

(e) The legatee must be known and certain.

(f) The legatee must not be an heir of the legator at the time of the latter's death.

(g) A sane and major legatee should not have unduly caused the legator's death.

(h) The thing bequeathed should be such property whose use or the use of whose usufruct or income is lawful in Shari'at.

(i) The bequest must not exceed one-third of the legator's property.

Explanation:

As regards (b):

If the entire property of the legator is encumbered by debts it is not lawful for him to make a bequest; but since the legator remains its owner, if he makes a bequest about it and before his death the property becomes free from encumbrances, the bequest shall be effective.

As regards (d):

Being in existence in fact is clear; being in existence in law will be, e.g., when a child is in its mother's womb; so if it is born alive after the legator's death it will take the bequest, howsoever short its life might have been.

As regards (f):

If a husband makes a bequest to his wife while he has other heirs as well, the bequest shall not be valid without the other heirs' consent. But if the husband gives an irrevocable divorce to the wife before his death-illness, on his death the bequest in her favour will be effective since she is no more his heir at his death. Or, if a person makes a bequest in favour of his grandson while he has sons and daughters too the bequest is valid; but if the son predeceases the legator and the grandson becomes the latter's heir, the bequest in his favour shall not be effective without the other heirs' consent; and the grandson will inherit from him. Notably, if the legatee is the sole heir of the legator, the bequest in his favour will be quite valid.

As regards (g):

If the legatee wrongfully kills the legator, the bequest shall be regarded as cancelled; but if the killer is a child or insane it will be effective.

Effects of Will

Section 4

The legator after taking possession of or accepting the thing bequeathed will be its owner.

Section 5

Whether a bequest is made in health or during death-illness, ordinarily it will be effective to the extent of one-third of the property only, except if the legator has no heir, or has an heir who gives consent for the excess over one-third.

Explanation:

If a person makes a bequest of over one-third of property and has no heir, it will be effective. Also if he has several heirs and they willingly agree to the will of over one-third, it will be effective. If some heirs agree and the others do not, it will be effective only as against those who agree to it but not against others.

Section 6

A bequest shall be effective in the property remaining after defraying the expenses of last rites as approved by the Sunnat and paying the debts of the deceased.

Section 7

The possession of the property bequeathed by the heirs will be in the nature of a bailment. If, therefore, before the execution of the bequest the bequeathed property is lost without any transgression from the heirs, they will not be liable to pay damages.

Section 8

If the legator bequeaths to two or more persons more than one-third of the estate and the heirs do not give consent to the excess over a third, the bequest will be effective for all the legatees within a third thereof in accordance with the proportions specified by the legator.

Section 9

If during death-illness a person makes a hiba, or sells anything owned by him for much lesser than its prevalent price, or buys something for much higher than its prevalent price, or hires something for much higher than its prevalent rent or marries in that state on a dower much higher than the proper dower, or increases the dower of a pre-existing marriage, or takes or does other similar gratuitous actions or favours, all of these will be governed by the law of bequests.

Explanation:

Thus, if the patient dies of the same illness, while the person for whom the gift has been made or the excess or reduction effected is his heir and the other heirs do not agree to the same, the gift or excess or reduction will be regarded as void, while the other actions mentioned above will take effect. If the said person is not the patient's heir at the time of his death, the gift or the excess or reduction will take effect but only within one- third; to be effective in more than that it will require the other heirs' consent as detailed in Section 5 above.

Section 10

If a person specifies a nominee for the amount due on his provident fund, life insurance policy, shares in cooperative societies or other similar things in accordance with the regulations governing them, the nominee — whether an heir or non-heir — will only be a bailee and not a legatee or donee. Therefore, the money deposited by or taken from the person who nominates will be divided after his death among the heirs as per the shares prescribed by the Shari'at; while the amount of interest will have to be necessarily given to the indigent without expecting for it a spiritual reward. Similarly, the amount paid in compensation in the case of loss of the life or property of the nominating person will also be distributed among his heirs as per the shares prescribed by the Shari'at.

Section 11

It is obligatory for the deceased to make a will before his death for the fidiah (redemption), expiation (kaffarah) and substitutes (badal) for those duties which are mandatory or obligatory for him by religion but which he could not perform.

Explanation:

E.g., fidiah for missed prayers and fasts, payment of unpaid zakat and Hajj-e-badal. [Details of these may be seen in the books of Fiqh].

Section 12

A bequest for the performance of things absolutely or near-absolutely prohibited in Islam will not take effect, since making a bequest for them is unlawful.

Section 13

(a) If the heirs are minor, no bequest should be made in favour of anybody.

(b) If they are major but indigent, again no bequest should be made in favour of anybody.

(c) It is better to make a bequest in favour of grandchildren and other indigent relatives, who for some reason will not inherit, than in favour of others.

Section 14

If a person has made bequests for different religious purposes which are farz (mandatory), wajib (obligatory) or nafl (voluntary), and all of them cannot be paid out of one-third of his estate, those for mandatory purposes will take precedence over those for obligatory purposes, and the latter over those for voluntary purposes. If all of them are for purposes of the same category, they will be paid in the order of time when they were made; and if the bequests having priority exhaust the one-third the remaining bequests cannot be paid.

Section 15

If the legator has made bequests for both religious and non-religious purposes, all of them will be paid out of the bequeathable-third only. In the portion thereof allotted to the bequests for non-religious purposes, no bequest will take precedence over any other and all shall be paid, while in that allotted to religious bequests precedence between various bequests shall be worked out as laid down in Section 14 above.

Explanation:

E.g., if a person makes bequests for a mandatory, an obligatory and a voluntary religious purpose, and also for A, B and C, those in favour of A, B and C will be paid to each of them; but those for religious purposes will be combined and out of this combined sum the bequests for mandatory, obligatory and voluntary purposes will be paid in this order.

Section 16

If there is a bequest for the repayment of debts to individuals, it will take precedence over all other bequests, both religious and non-religious.

Section 17

If a creditor says to a debtor "I absolve you of my debt after my death", this will be treated as a bequest.

Section 18

The words used by the legator in his bequest shall be construed with reference to local custom.

Explanation:

If a legator has used expressions like "children", "neighbours", "family members", etc., their meaning will be determined by local custom. If by local custom "children" includes both sons and daughters, the bequest shall be treated as one for both, but if by custom the word "children" applies only to sons, it will be for sons only. Similarly, if by custom "neighbours" means all neighbours whether living in their own or rented houses the bequest shall be for all of them. Thus, the meaning and import of the words used by the legator in his bequest shall be ascertained in accordance with local custom.

Section 19

If the legator has left a bequest for the poor of a particular city, the bequeathed property will be distributed among the poor of that city only.

Section 20

It is lawful to bequeath the right of residence in or the income of a house, whether for good or for a specified period.

Section 21

The legator can revoke his bequest; and revocation can be made known in many forms, some of which are stated below:

(a) he may revoke the bequest by express words saying "I revoke my bequest";

(b) he may so alter the bequeathed property that its name changes or its commercial value is lost, or makes such additions to it which cannot be separated from it;

(c) the legator may so deal with the bequeathed property that he loses its ownership;

(d) if the legator remains an insane for six months after making the bequest, it shall become void and will be treated as revoked;

(f) if the legator says "my bequest is void", it will be treated as revoked;

Explanation:

As regards (b):

An Example of alteration is to bequeath cloth and then get suits stitched out of It; that of losing basic features to demolish the bequeathed house; and of addition mixing milk with tea.

As regards (c):

E.g., to sell or gift the thing bequeathed.

Section 22

Legator's denial of bequest will not be treated as its revocation.

Section 23

The acceptance by a legatee will be valid only if it is in accord with the legator's offer; but not otherwise.

Explanation:

E.g., if a person bequeaths something jointly to two persons and only one of them accepts while the other refuses it, the bequest will not take effect in favour of the accepting legatee either, since the acceptance is not in accord with the offer.

Chapter 2: The Executor

Section 24

An executor is a person nominated by the legator for taking care of his minor or insane children, distribution of the estate, execution of bequests, and protection of assets, etc., after his death.

Section 25

If a person has not appointed an executor, the qazi will have the authority to appoint someone as the executor for fulfilling the purposes mentioned in Section 24 above. The person nominated by the legator is called the "real executor" or "legator's executor", and the one appointed by the qazi the "judicial executor".

CONDITIONS FOR EXECUTOR

Section 26

A person to be appointed as the executor must have the following qualities:

(i) being a Muslim;

(ii) sanity;

(iii) majority; and

(iv) capability.

Section 27

If a person is nominated as an executor in violation of the aforestated conditions, it will be obligatory for the qazi to appoint another person fulfilling the said conditions.

Section 28

The executor may or may not be a relative.

Section 29

If after the legator has made the bequest the executor has not rejected the executorship and has agreed to it in the presence or knowledge of the legator, or in his absence or ignorance, or after his death in the presence of some persons, in all these cases of acceptance the

executor cannot now be relieved of his responsibility, except if he rejects it in the legator's knowledge, or if the legator has died, in the presence and with the consent of the qazi.

Section 30

If an executor who did not refuse his assignment and had kept quiet during the legator's life time, rejects it after his death, but before the rejection is approved by the qazi expresses his acceptance, the acceptance will be valid and he will be regarded as the executor.

Section 31

If an executor had kept quiet during the legator's life time but begins discharging his responsibilities after his death, this is acceptance by conduct on his part.

Section 32

Rearing, education and training of the legator's children will be the legatee's foremost obligation.

Section 33

The legator can at any time remove the executor appointed by him.

Section 34

If the executor is unable to perform in full all his assigned jobs, the qazi will add more persons for the performance of those jobs as may be necessary.

Section 35

If the executor is wholly unable to perform the assigned jobs, the qazi shall remove him and appoint another person in his place as the executor.

Section 36

If one of the two executors appointed by the deceased dies and the deceased executor has not on his part named the surviving executor or a third person as the executor, in such a situation the qazi will nominate another executor along with the surviving executor.

Section 38

If the deceased had appointed two executors, or if there is one executor appointed by the deceased and another by the qazi (in those cases where it is lawful for the qazi to appoint an executor), neither of them can have any dealing without the consent of the other, except in some special situations.

Section 39

If the two executors are in agreement that the legator's estate will remain in the custody of either of them or a third person, it will be so; and in the case of difference of opinion each

executor will take custody of half of the heritable estate, and the impartible property will remain in the custody of both turn by turn for specified periods.

Section 40

If an executor says to a person "I appoint you my executor", this other executor will be the custodian of the goods, property and affairs of the first legator as well, and will be entitled to deal with the property and goods also of the person who has appointed him, i.e., the second legator. However, he will have the right to deal with the property and goods of either of them only if so specified by the appointing executor.

Section 41

The executor cannot sell the movable or immovable property of the legator except for extreme necessity; and in a case of extreme necessity sales will begin with movable property.

Explanation:

"Extreme necessity" refers to the necessities relating to the legator's property and goods, or to his family members.

Section 42

If the deceased has left no debt and no bequest and all his heirs are major and are present, the executor shall not in such a situation take any step in respect of any matter relating to the legator's property and goods without the express consent of the legator's heirs. However, if the heirs are avoiding discharge of debts payable by the legator, or payment of lawful legacies left by him, the executor will perform both these functions.

Section 43

An executor appointed by the mother can sell, if necessary, only the movable property inherited by the minors out of her estate, provided that the father or the grandfather has not appointed an executor.

Section 44

The executor appointed by the mother can sell movable things inherited out of her estate if necessary for the payment of debts and for the execution of the bequest.

Section 45

If is not lawful for the executor or his family to benefit in any way from the legator's property, neither by raising loans on it nor by using it for business.

Section 46

The executor can lawfully appoint a representative to act on his behalf in respect of transactions. The representative so appointed by him will automatically vacate his position on the executor's death or on the children becoming major.

Section 47

It will not be valid for the executor to acknowledge existence of a debt or legacy on the part of the legator.

Section 48

If an heir of the deceased acknowledges a legacy left by the latter while the other heirs deny it, the acknowledgment by the acknowledging heir will be limited in its effect only to his share in the estate of the deceased and will not in any way affect the shares of the other heirs.

Section 49

If an executor pays an alleged debt of the deceased for which the claimant had no witness or evidence, nor any decision of the qazi or affirmation by the heirs, he will be liable to compensate for it.

Section 50

If the legator has not fixed up any honorarium for the executor, it will be lawful for the latter to take a suitable honorarium in the customary way from the property of the legator's minor children.

A decision by the qazi will be a cautious and safe way for the determination of the quantum of honorarium.

PART V: LAW OF INHERITANCE

Chapter 1: General Principles

DEFINITION OF INHERITANCE

Section 1

What the relatives of a deceased person get without the consent or option of the deceased (propositus) in the estate, i.e., the property or actionable claims left behind by him, is known in legal terminology as "inheritance".

Explanation:

(a) In the estate of the deceased there may be his own right, e.g., expenses of his last rites, or such rights of others in creating which he had an action or option, e.g., his debts and legacies. Inheritance is a right different from all these, which is created by the Shari'at irrespective of the consent or option of the deceased in favour of his relatives. This is a right which no one can abolish, nor can any propositus prevent the establishment of this right by disinheriting any heir, or otherwise, in his life time.

(b) "Estate" is a general term which includes movable and immovable property, whether in cash or kind, and whether in the possession of the deceased or of others at the time of his death, e.g., debts due to him, provident fund, etc., all of which will be included in the estate.

(c) Just as the property of the deceased becomes his estate, some of his actionable claims are also regarded as his estate, e.g., the diyat (blood money) or return for qisas (revenge), which during his life time remains only a claim, not property.

(d) Those relatives whose rights in the estate of the deceased are determined by the Shari'at are called the "heirs".

CONDITIONS FOR INHERITANCE

Section 2

There are three conditions to inherit from the estate of a deceased person:

(i) certainty or a strong belief about the death of the propositus;

(ii) certainty or a strong belief about the life of the claimant-heirs at the time of the death of the propositus; and

(iii) knowledge about the dimensions of inheritance, i.e., knowledge as to who is an heir and on what grounds.

Explanation:

(a) There may be actual information of a person's death and in that case one has definite knowledge of the same. But some times a person may be missing so that there may be no news about his life or death – in which case since till the expiry of such tune in which other persons of his age die there can be no certainty or a strong possibility of his death, his estate will not be distributed among the heirs. However, on the expiry of such time there will be a strong belief about his death, and then his property will be distributed among his heirs. At times a person may be involved in an accident resulting into loss of several lives and if nothing is known about him even after due waiting for search and inquiry, there will be a strong possibility of his death in the accident; and, therefore, treating him as deceased his property may be distributed among his heirs.

(b) If a deceased person has died leaving his wife pregnant and the woman gives birth to a living child within the period during which birth is treated as legitimate, it will inherit from the deceased. Similarly, if the propositus and an heir die together in a fire or by drowning and it is not known who died first, there can be no strong belief about the life of either of them at the time of the other's death and so neither of them will be the other's heir; the property of both will be distributed among their respective living heirs.

(c) The heirs are of different categories and may be relatives by marriage or blood, or in law, and the relatives by blood might be the Qur'anic, agnatic or uterine heirs, among whom too there is difference of degrees and an order of priority so that shares of some relatives are reduced or cancelled due to the presence of some others. It is necessary for these reasons to know the basic status of the heirs as detailed in the forthcoming Sections.

(d) The heir and the propositus may be related by affinity due to marriage, or by blood due to family descent, or in law as a result of a contract subject to some special conditions known in the Shari'at as 'aqd-e-muwalat. If a person tells another "you are my friend and if ever in my life I become legally bound to pay a compensation, etc., it will be obligatory for you to pay it and after my death you will inherit my estate", and the other person agrees to it, as a result of this contract a special kind of relation is created between the two which in Shari'at is called relationship-in-law, while the person so designated as an heir is known as the "contractual heir". The basic condition for such a contract is that the offerer should be a free man (not a slave) and of unknown descent. If a person enters into such a contract in the presence of any of his blood relations including uterines, it will be of no effect and give no right of inheritance to the designated heir. Notably, such a contract may also be bilateral, provided that both the parties are "free" and of unknown descent, in which case both will be each other's contractual heirs.

Bars to Inheritance

Section 3

There are two reasons applicable to the Muslims each of which deprives an heir of his right to inherit, viz.:

(a) if the heir kills the propositus, provided that it makes qisas (revenge) obligatory, or kaffarah (expiation) obligatory or preferential; and

(b) if the heir and the propositus are of different religions.

Explanation:

(i) a killing is of different kinds. Some of these make qisas or kaffarah obligatory, or the latter preferential, viz. (a) murder, (b) culpable homicide, (c) homicide, and (d) feticide. In some cases of killing no qisas or kaffarah becomes obligatory, viz. (a) killing for a lawful reason, (b) killing by an insane or minor and (c) killing as permitted by the Shari'at (i.e., by way of hudud or qisas) or In defense of one's life. The killer will not inherit from the person killed where the killing makes qisas or kaffarah obligatory; in the other cases he will inherit. Notably, if before the death of the person killed, the killer by chance dies for any reason, the former will inherit from the latter. If a father kills his son in those situations which make qisas or kaffarah obligatory for others though not for a father by way of respect, he too will be deprived of his deceased son's estate.

(ii) Non-Muslim heirs of a Muslim propositus will not inherit the latter's estate, whether they are born non-Muslims or apostates. Similarly, a Muslim cannot inherit from a non-Muslim propositus, provided that he was a born non-Muslim. If he was an apostate, the property owned by him before his apostasy will be distributed among his Muslim heirs. If a woman apostates, all her property, whether acquired before or after apostasy, will be distributed among her Muslim heirs.

Order of Priority in Payments out of Estate

Section 4

If in any of the properties left by the deceased another person directly had a legal right, it will be met from it on top priority. If there is no such legal right of any one else and all rights in the estate left belonged exclusively to the deceased, expenses of his last rights will be met first. Next will be paid the debts incurred by him during health or sickness — the former being given priority over the latter. Then, out of a third of the remaining estate bequests left by the deceased shall be paid. At the end, the remainder will be distributed among the heirs.

Explanation:

(a) Sometimes a person has a direct right over the property of another person, e.g., when a debtor mortgages his property with the creditor, the creditor gets a direct right on the mortgaged property. Such a right in the property of a deceased has priority over all other rights in it. If in such a case the debtor dies before paying the debt and without leaving any property other than the mortgaged one, first of all the debt of the creditor-mortgagor will be paid. Then, out of the remainder the expenses of his last rites will be paid and bequests met out of one-third, and the rest will be distributed among the heirs.

(b) "Debts incurred in health" mean those proved by evidence or acknowledged during health; "debts incurred in sickness" are those where this is not the case.

(c) If the estate of the deceased is not adequate for the payment of all the debts, each debt will be paid proportionately.

(d) A bequest may be charitable, e.g., for digging a well, or religious, e.g., for expiation for missed prayers. Both will be paid only out of a third of the estate, as per details given in Part IV of this Compendium dealing with bequests.

CLASSES OF HEIRS AND ORDER OF THEIR RIGHTS

Section 5

Some among the heirs take priority over the others. The heirs are, therefore, classified into various groups, and inherit as per the following details and orders of priority:

(i) Qur'anic Heirs:– These are the heirs whose shares are fixed by the Holy Qur'an, Traditions of the Prophetﷺ or Consensus of the Community, and are to be paid their shares first out of the deceased person's estate.

(ii) Agnatic Heirs:– These are the heirs who are specified as such in the Qur'an or the Hadith but not with any fixed shares; they instead get what remains after paying the fixed shares of the Qur'anic heirs, or in their absence inherit the full estate.

(iii) Heirs by Return:– They are those Qur'anic heirs who in the absence of the deceased person's agnates get the remainder of his estate in proportion with their Qur'anic shares.

(iv) Uterine Heirs:– These are the deceased person's relatives not being his Qur'anic or agnatic heirs and become his heirs if the deceased has left behind no Qur'anic or agnatic heir, or none of them except the surviving spouse.

(v) Universal Legatee:– i.e., the person to whom the deceased has bequeathed all his property and will get it if there be none of the aforementioned heirs; and the same will not go to the State.

(vi) Bait-ul-Mal:– If none of those entitled to inherit as aforesaid be there, the estate will go to the Bait-ul-Mal (public treasury) set up in accordance with the principles of the Shari'at; and if there is no such Bait-ul-Mal it will go to the surviving spouse.

Explanation:

(a) If there is a remainder after allotting the fixed shares of the Qur'anic heirs and there is no near or distant agnate entitled to get it, it will be distributed among the same Qur'anic heirs in proportion to their shares and will not go to the uterines. This second distribution is technically called radd (return), to which only the Qur'anic heirs by blood are entitled, and not the Qur'anic heir by affinity, i.e., the surviving spouse. Thus, if among the heirs of the deceased there is only the surviving spouse and no other Qur'anic or agnatic heir, the surviving wife or husband would get 1/8 or 1/4 as the case may be, and the remainder would be distributed among the uterine heirs.

(b) The agnatic heirs are basically of two kinds, agnates by blood and agnates for special reasons, but there are now no agnates for special reasons; and agnates by blood are further divided into various classes as detailed later.

(c) By the Shari'at law, next to uterine heirs the estate goes to the contractual heir or the acknowledged kinsman; but such entitlement is now a rare and exceptional possibility. However, if there is such an heir, in the absence of all Qur'anic, agnatic or uterine heirs the estate will go first to a contractual heir as mentioned in Explanation (d) under Section 2, and the acknowledged kinsman would get nothing. If there is no contractual heir the estate will then go to the acknowledged kinsman, i.e., a person acknowledged by the deceased as his or his father’s brother, if he stuck to that acknowledgement till his death. If there be no acknowledged kinsman either, the estate will go to the universal legatee, if any, or deposited in the Bait-ul-Mal (public treasury).

(d) Notably, certain Qur'anic heirs may sometimes have a dual capacity and inherit both as a Qur'anic and an agnatic heir; and some of the Qur'anic heirs become agnatic heirs only, as per the details to follow.

Chapter 2: Qur'anic Heirs

Section 6

There are twelve Qur'anic heirs – four men and eight women.

Men: (i) father, (ii) grandfather how high soever, (iii) husband, (iv) uterine brother.

Women: (v) uterine sister, (vi) wife, (vii) daughter, (viii) son’s daughter, (ix) full sister, (x) consanguine sister, (xi) mother, (xii) paternal or maternal grandmother.

Explanation:

(i) 'father' includes only the real father of the deceased but not a step father.

(ii) 'grandfather' includes great-grandfather on the paternal side, how high soever;

(iii) 'husband' and 'wife' mean those men and women between whom there was a valid marriage; if there was no valid marriage the parties will not be each other's heir;

(iv) 'uterine brothers/sisters' are those who have a common mother but different fathers;

(v) 'son's daughter' includes son's daughter, son's son's daughter, and son's son's son's daughter, how low soever;

(vi) 'full sister' means a daughter of the same parents;

(vii) 'consanguine sisters' are those having a common father but different mothers;

(viii) 'mother' means the woman who gave birth to the deceased and does not include a step-mother;

(ix) 'paternal grandmother' includes deceased person's father's mother and father's father's mother, how high soever, and their mothers and maternal grandmothers;

(x) 'maternal grandmother' includes mother's mother and her mother and grandmother how high soever.

SHARES OF QUR'ANIC HEIRS

Section 7

Father's shares:–

(i) If the father survives along with a son, son's son or son's son's son how low soever, he gets 1/6.

(ii) If there is no male child or grandchild how low soever, and there are only a daughter, son's daughter or son's son's daughter, etc., the father will first get 1/6 as a Qur'anic heir, and then as an agnate also the remainder if there is any, after giving the shares of the said daughter, etc.

(iii) If the deceased has left no child or lower descendant in the male line of descent, male or female, the father as an agnate will get the whole estate.

Section 8

Grandfather's shares:–

In the absence of the father his father will inherit like him in any of the three situations mentioned above. Notably, in the presence of the father his father, and in the latter's presence his father, how high soever, will be excluded.

Section 9

Husband's shares:–

If the deceased has left no child or son's child how low soever, the husband will get 1/2; if there is one he will get 1/4.

Section 10

Shares of uterine brother/sister:–

If there be one such brother/sister the share would be 1/6; if there are two or more they would together get 1/3. If the deceased has left behind a child or son's child how low soever, or father or grandfather how high soever, the uterine brother/sister will be excluded. Notably, uterine brother/sister equally share 1/3 of the estate.

Section 11

Wife's shares:–

If the husband has left behind a child or son's child how low soever, the wife gets 1/8; if not she gets 1 /4; and if there are two or more wives they all equally share these entitlements.

Section 12

Daughter's shares:–

(a) If the deceased has left behind only one daughter and no son, she gets 1/2 of the estate.

(b) If there are two or more daughters and no son, their joint entitlement would be 2/3 which they will share equally.

(c) If the deceased has left behind both sons and daughters, the latter will become agnates and each daughter will get half of the share of each son.

Section 13

Son's daughter's shares:–

(a) If the deceased has left behind no son and no daughter but only a son's daughter, she will get 1/2 of the estate.

(b) If the deceased has left behind no son and no daughter but two or more son's daughters, their total entitlement will be 2/3 which they will share equally.

(c) If the deceased has left behind one or more son's daughter along with one daughter, the son's daughter or all son's daughters will get 1/6, to be shared by them equally if there are more than one.

(d) If along with the son's daughter there is a son's son of an equal or lower degree the son's daughter will become an agnate and each son's daughter will get half of each son's son's share.

(e) If the son's daughter is of a lower degree (e.g., a son's son's daughter), she will be excluded by the son's son of a higher degree.

(f) A son of the deceased will exclude all son's sons and son's daughters.

(g) If the deceased has left behind two or more daughters but no son or son's son of a degree equal to or lower than the son's daughter, she will be excluded; and if there is such a son's son she will become an agnate and get half of his share. Notably, the daughter becomes an agnate only with the son of the deceased; but son's daughter also with son's son of the deceased of an equal or lower degree.

Section 14

Full sister's shares:–

(a) One sister gets 1/2, and two or more 2/3 to be shared by them equally.

(b) If full sister survives with a full brother, she becomes an agnate and gets half of his share.

(c) If the sister survives with a daughter or son's daughter how low soever of the deceased, she becomes an agnate and gets the remainder after giving shares of the Qur'anic heirs.

(d) If the deceased is survived by a son or son's son how low soever, or his father or grandfather how high soever, the sister will be excluded.

Section 15:–

Consanguine sister's shares:–

(a) If there is no full sister, a consanguine sister gets 1/2, and if there are two or more they get 2/3 to be shared by them equally.

(b) If the deceased has left one full sister, the consanguine sister or sisters will get only 1/6.

(c) If a consanguine sister survives along with a consanguine brother, she will become an agnate and get half of his share.

(d) If the deceased has left behind also a daughter or son's daughter how low soever, the consanguine sister will become an agnate and inherit the remaining estate.

(e) If the deceased has left behind a son or son's son how low soever, or his father or grandfather how high soever, or a full brother, the consanguine sister will be excluded.

(f) If the deceased has left two or more full sisters and no consanguine brother the consanguine sister will be excluded, but if there is a consanguine brother she will become an agnate and get half of his share.

(g) If the deceased has left behind one full sister, a consanguine brother and a consanguine sister, the consanguine sister will become an agnate and get half of consanguine brother's share.

(h) If the deceased has left behind a daughter or son's daughter how low soever and also a full sister, the consanguine sister will be excluded.

Section 16

Mother's shares:–

(a) If the deceased has left behind a child or child of a son how low soever, or two or more brothers/sisters of any kind (full, consanguine, uterine), the mother gets 1/6.

(b) If the deceased has left no child or child of a son how low soever, and no brother/sister, or if there is only one brother or sister, the mother gets 1/3.

(c) If the deceased has left behind the spouse but not the father, the mother gets 1/3 of the whole estate.

(d) If the deceased is survived by the spouse and the father, the mother gets 1/3 of the estate minus the share of the spouse.

Section 17

Grandmother's shares:–

(a) If there is only one grandmother, paternal or maternal, she gets 1/6.

(b) If there are two or more paternal/maternal grandmothers of the same degree they equally share the said 1/6.

(c) If they are of different degrees, two or more, the nearer will get 1/6 and exclude the remoter.

(d) If the deceased has left behind the mother, the grandmother (paternal or maternal) will be excluded.

(e) If the deceased has left behind the father, the father's mother will be excluded and the mother's mother will get 1/6.

(f) If the deceased has left behind his grandfather how high soever, the said grandfather's mother and grandmother how high soever will be excluded, but his wife and her mother or mother's mother how high soever will not be excluded. Similarly, the maternal grandmothers of the deceased, how high soever, will not be excluded by the grandfather and will get 1/6.

Chapter 3: Agnatic Heirs

Section 18

Agnates are of three categories — agnates in their own right, agnates by the right of others, and agnates along with others.

Definition of 'agnates in their own right':– These are the agnates related to the deceased without the intervention of a woman. They are of four classes:

A. male lineal descendants of the deceased, i.e., his son, grandson, great-grandson, how low soever;

B. deceased person's father, grandfather, great-grandfather, how high soever;

C. male lineal descendants of his father, i.e., brother, brother's son, brother's son's son, how low soever;

D. male lineal descendants how low soever of the deceased person's grandfather how high soever, i.e., paternal uncle and his lineal male descendants how low soever, father's paternal uncle and his lineal male descendants, and grandfather's paternal uncle and his lineal male descendants, etc.

Section 19

'Agnates by the right of others':– These are the female Qur'anic heirs getting 1/2 or 2/3 who become agnates with their respective brothers to get half of latter's shares, i.e., daughter, granddaughter, full sister and connsanguine sister.

Section 20

'Agnates along with others':– These are the full or consanguine sisters of the deceased when they become agnates with the daughter or granddaughter of the deceased.

Section 21

Among the three classes of agnates mentioned above, the nearer excludes the remoter and the doubly-related excludes the singly-related.

Explanation:

(a) E.g., class A of agnates will exclude class B, class B will exclude class C, and class C will exclude class D. Similarly among the several agnates of the same class the nearer in degree will exclude the remoter, e.g., the son of the deceased being a nearer agnate will exclude the grandson — the grandson being a remoter agnate will be excluded by the son.

(b) If with the 'agnates by the right of others' or 'agnates with others' there are remoter agnates (even of the class of 'agnates in their own right'), the former will get priority and take the estate, excluding the remoter agnates. E.g., if the sister of the deceased has become an agnate with his daughter, and there is also a paternal uncle, being a remoter agnate than the sister he will be excluded, though he is an agnate In his own right; the sister — though she is an agnate with another person — will get the remainder of the estate.

(c) If there is a full brother or full paternal uncle of the deceased, and also a consanguine brother or consanguine paternal uncle, the former being doubly related to the deceased will exclude the latter.

Chapter 4: Uterine Heirs

Section 22

Those relatives of the deceased who are neither Qur'anic heirs nor agnatic heirs are called uterine heirs.

Section 23

If there is no Qur'anic heir by blood and no agnate, the estate will go to the uterine heirs.

Section 24

In the presence of the husband or wife who are called 'Qur'anic heirs by a reason', the estate will go to uterine heirs.

Classes of Uterine Heirs

Section 25

Like the agnates, there are four successive classes of uterines:

I. Deceased person's daughter's or son's daughter's children, how low soever.

II. Those ascendants of the deceased who are neither Qur'anic nor agnatic heirs — e.g., mother's father and grandfather, and mother's mother's grandparents.

III. Those descendants among the deceased person's brother/sister who are neither Qur'anic nor agnatic heirs — e.g., sister's son, sister's daughter, brother's daughter and their children; and children of uterine brother/sister.

IV. Those descendants of the grandparents of the deceased who are neither Qur'anic nor agnatic heirs, e.g., his paternal and maternal aunts, maternal uncle, uterine paternal uncle, and their descendants.

Section 26

Like among the agnatic heirs, each class of uterines will exclude all the succeeding classes.

Section 27

The rule for class I of uterines are as under:–

(a) Nearer in degree, whether male or female, will exclude the remoter.

Explanation:

Daughter's daughter will exclude daughter's daughter's son.

(b) If all uterines are related to the deceased in an equal degree but some of them are descendants of Qur'anic heirs and others of uterine heirs, the estate will go to the former and the latter will be excluded.

Explanation:

Son's daughter's daughter, being the descendant of a Qur'anic heir, will exclude daughter's daughter's daughter who is a uterine's descendant.

(c) If the deceased has left behind several uterines all of whom are descendants of Qur'anic heirs only, or of uterine heirs only, and among their links to the deceased in each generation there is parity of sex, the estate of the deceased will be divided directly among the said uterines in equal shares; and if there are among them both males and females the males will take 2/3 and the females 1/3.

Explanation:

E.g., if the deceased has left behind one daughter's son of each of his two sons, since both are descendants of a Qur'anic heir (son's daughter) and among their links to the deceased in each generation there is parity of sex, the estate will be divided equally between these two male uterine heirs. Similarly, if the deceased has left behind one daughter's daughter of each of his two daughters, since they are descendants of a uterine heir (daughter's daughter) of equal degree and have parity of sex among their links in each generation up to the deceased, the estate will be equally divided between them. If among these situations the claimants differ in sex, e.g., where the deceased has left a daughter's son of one daughter and a daughter's daughter of the other daughter, the male will take 2/3 and the female 1/3.

(d) As regards clause (c), if there is difference of sex in any one generation among the claimant-uterines' links to the deceased and there is one claimant each in each generation

both related to him singly, the estate of the deceased will first be divided in the generation differing in sex as per the rule of double share for the male, and the share of each generation so allotted will then go to the claimant through him or her.

Explanation:

E.g., if there is a daughter's son's daughter and a daughter's daughter's son, the presumptive share of the daughter's son will be 2/3 and of the daughter's daughter 1/3, and the same will go to their respective children so that the daughter's son's daughter will get 2/3 and the daughter's daughter's son 1/3 — though the female claimant will get double that of the male claimant.

(e) If in the situation of clause (c), there is difference of sex in more than one generation and the rest of it is like that of clause (d), the estate will first be divided among the members of the highest generation differing in sex, as per the rule of double share for the male, and the descendants of the males and females will be put into separate groups. Then, if in any of these groups there is no more difference of sex in any lower generation, its share will be distributed among the members of its lowest branch (claiming as uterine heirs of the deceased) equally if they are of the same sex, and if they differ in sex according to rule of double share for the male. In the group where there is further difference of sex in a lower generation, its collective share will be again divided in the said generation as per the rule of double share for the male and, re-grouping the males and females in it, the collective share of each of these groups will be distributed among the members of their respective lowest branch (claiming as uterine heirs of the deceased) — equally if they are of the same sex, and according to the rule of double share for male if they differ in sex — provided that there is no further difference of sex in any other generation. If there is such a further difference, the same rule will be applied to each generation having members of different sex until reaching the last group whose share will be divided among its members (claiming as uterine heirs of the deceased).

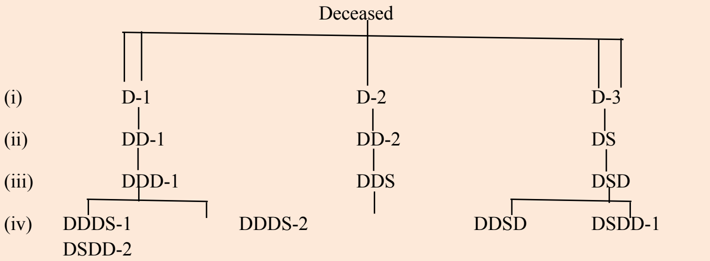
Explanation:

Its Example may be seen in Al-Sirajiyah under "Section on the First Category" and the clarification of the Example in Al-Sharifiyah on pages 100-101.

(f) If the deceased has left several uterine heirs of some branches and single such heirs of some others, in each male and female branch will be counted as many members as may be the number of claimants through it and the estate of the deceased will first be distributed per stirpes in these branches, keeping in mind their sex and presumptive number of members. This will be followed by making separate groups of males and females; and the share of each group will be distributed among its lowest descendants as per the details given in clauses (d) and (e) above.

Explanation:

E.g., a deceased person has left behind two daughter's sons of one daughter's daughter, a son's daughter of a second daughter's daughter and two daughter's daughters of a daughter's son as shown in the chart:

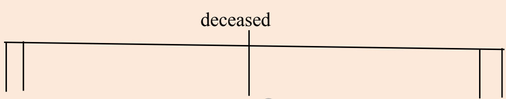


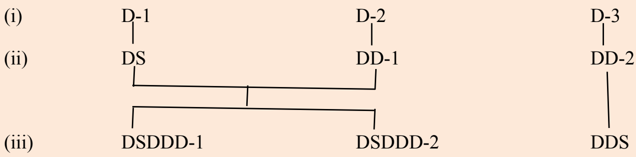
The estate will first be divided in generation (ii) into seven shares so as to give four shares to DS and three together to DD-1 and DD-2; and separate groups of descendants and females will be made. The four shares of DS will go to his two granddaughters (DSDD-1 and DSDD-2), and the three shares of DD-1 and DD-2 will be divided equally among their children (DDD-1 & DDS), since DDD-1 due to the number of claimants through her will count for two girls, and DDS having a single claimant through him but being a boy will count as two girls. Now the shares of DDD-1 and DDS will go to their respective descendants so that the share of DDDS-1 and DDD-2 together will be the same as of DDSD alone.

(g) If the deceased has left among his heirs such uterines who have parental relationship through two or more branches of the deceased, treating each branch as male or female and consisting of as many members as the number of claimants through it, the estate will be first distributed among those branches having regard to their sex and number of members. Then, males and females will be put in separate groups so that the share of each group is distributed among the descendants in it as per the details of clauses (d) and (e).

Explanation:

E.g., a daughter's son and a daughter's daughter of the deceased inter-marry, and their two daughters are among his surviving heirs along with the son of a third daughter's daughter, as shown in the chart:





As per clause (d) the estate will first be divided in generation (ii) and accordingly for DS and DD-1 (who have two daughters) will be counted two male and two female children respectively. The estate will then be divided into seven shares giving four of them to DS, and three to DD-1 and DD-2 together. Making separate groups of descendants of males and females, the four shares of DS will go to his two daughters (each taking two), and the three shares of DD-1 and DD-2 will be divided in generation (iii) as per the rule of double share for male so that DSDDD-1 and DSDDD-2 will together get what DDS will get alone.

Section 28

The rules for class II of uterine heirs are as under:–

(a) The nearer will exclude the remoter.

Explanation:

E.g., if the deceased has left behind mother's father, father's mother's father and mother's father's both parents, his estate will go to his mother's father alone; all the others will be excluded.

(b) If the deceased has left several uterine heirs of the same degree all of whom are related only through the mother (female ascendant), or only through the father (male ascendant), and there is parity of sex in each generation between them and the deceased, his estate will be directly divided among the said uterine heirs equally — and if among them there are both males and females, the former will take 2/3 and the latter 1 /3.

Explanation:

E.g., if the deceased has left behind mother's father's father and mother's father's mother, the estate will be divided between them so that the mother's father's father gets 2/3 and the mother's father's mother 1/3.

(c) In the situation of clause (b), if there is difference of sex in any intervening generation, the estate will first be divided in that generation with males taking 2/3 and females 1/3 and, like class I, groups of ascendants of males and females will be made so as to give the share of each group to the claimants in it equally if they are of the same sex, and in the ratio of 2:1 in the case of difference of sex.

Explanation:
E.g., if the deceased has left behind mother's father's parents and her mother's father, the estate will first be divided among mother's parents in the ratio of 2:1 and, like class I, groups of descendants of males and females will be made. Then, 1/3 of the mother's mother will go to her father (mother's mother's father), and the 2/3 of mother's father will be given to his parents (mother's grandparents) in the ratio of 2:1.

(d) If the deceased has left several maternal and paternal relatives of equal degree, the maternal relatives will get 1/3 and the paternal relatives 2/3. Then, the share of each side will be divided among its members as per clauses (b) and (c).

Explanation:
E.g., if the deceased has left behind his father's mother's father, mother's father's father and mother's mother's mother, 2/3 of the estate will go to father's mother's father alone, and 1/3 to mother's side in which it will be divided among the mother's father and mother's mother in the ratio of 2:1. Then, groups of ascendants of males and females will be separately made so that mother's mother's 1/3 share goes to her father (deceased person's mother's father) and mother's father's 2/3 share to her father (deceased person's mother's father's father).

Section 29
Rules of distribution for class III of uterine heirs (i.e., children of full or consanguine sisters and of uterine brothers/sisters) are as follows:

(a) Nearer in degree will exclude the remoter.

Explanation:
E.g., if the deceased has left behind a sister's daughter and a brother's daughter's son, his estate will go to the former and the latter will be excluded.

(b) Children of the Qur'anic and the agnatic heirs will get preference over those of the uterine heirs.

Explanation:
E.g., if the deceased has left a full or consanguine brother's son's daughter and a full or consanguine sister, or a uterine brother/sister's daughter's son, the estate will go to the former and the latter will be excluded.

(c) If all uterine heirs are direct descendants of Qur'anic or agnatic heirs, or all are descendants of uterine heirs, or some of them are direct descendants of Qur'anic heirs and the others such descendants of agnatic heirs, the estate of the deceased will first be divided among the ascendants of the claimants (brothers/sisters of the deceased), having regard to

the number of claimants and plurality of sides — and then without making groups of males and females the share of each ascendant will go to his or her descendants — equally if they are of the same sex, and in the ratio of 2:1 if they differ in sex; except in the case of descendants of uterine brother/sister who will share it equally irrespective of their sex.

Explanation:

E.g., the deceased has left one daughter each of a full, a consanguine and a uterine brother, and one son and one daughter each of a full, a consanguine and a uterine sister. Here 1/3 of the estate goes to the uterine brother/sister who are Quranic heirs, and 2/3 to full brother/sister who are agnatic heirs, and they will exclude the consanguine brother/sister and therefore their children too. Then, out of the 1/3 of uterine brother/sister 2/3 will go to the uterine sister who has two claimants through her, and the remaining 1 /3 will be divided equally like among the uterine brothers/sisters themselves. The 2/3 of full brother/sister will be so divided that 1/2 of it will go to the sister who has two claimants through her, and the other 1/2 to the brother and through him to his daughter; while out of the sister's 1/2 her son will get 2/3 and her daughter 1/3.

Example II:— If the deceased leaves behind one son's daughter each of a full, a consanguine and a uterine brother, the whole share will go to the full brother's son's daughter since she is the descendant of an agnate. Consanguine brother's son's daughter is also an agnate's descendant but is excluded by the full-blood claimant, while uterine brother's son's daughter who is the descendant of a uterine heir will be excluded by the descendants of agnates.

Note:— Exmples of how a uterine heir may be related to the deceased through two sides may be seen in the Radd-ul-Muhtar, pages 694-95, under Category III.

Section 30

Among the uterine heirs of class IV, the claimants of category A are the deceased person's maternal uncle and aunt, paternal aunt and uterine uncles, and all of them are related to the deceased in equal degrees.

Category B in this class consists of descendants of all these uterine heirs and of the deceased person's paternal uncle's daughter's children.

Category C consists of deceased person's parents' paternal and maternal aunts and maternal uncles, all uncles of the deceased person's mother, and all uterine uncles of deceased person's father.

Category D consists of descendants of all these heirs.

Section 31

Rules for category A in class IV are as under:

(a) If there is one claimant in this category he or she gets the whole estate.

(b) If there are two or more claimants in this category and all of them are related to the deceased through a male only, or a female only, some of them will be preferred to others due to nearness of blood; and if among those nearer in blood there are both males and females, the males will get 2/3 and the females 1/3; while if all of them are male, or female, they will equally share the estate.

Explanation:

E.g., the deceased leaves behind full, consanguine and uterine paternal aunts, the full paternal aunt will exclude the others. If he is survived by a uterine paternal uncle and a uterine paternal aunt, the former will get 2/3 and the latter 1/3. Similarly, a full maternal aunt will exclude a consanguine maternal uncle; while consanguine maternal uncle and aunt will share the estate in the ratio of 2:1.

(c) If the deceased has left several claimants in category A class I some of whom are related to the deceased through a male and others through a female, all will inherit but those claiming through a male will get 2/3 and those claiming through a female 1/3, and then the share on each side will be distributed as per nearness of blood and the rule of double share for the male.

Explanation:

E.g., if the deceased has left full, consanguine and uterine paternal and maternal aunts, the paternal side will get 2/3 and the maternal 1/3; and these shares on both sides will go to full aunts only, due to their nearness of blood to the deceased.

If the deceased has left behind uterine paternal uncles and aunts and maternal uncles and aunts of all kinds, 2/3 will go to uterine paternal uncles and aunts, and 1/3 to full maternal uncles and aunts — to be divided among them as per the rule of double share for the male.

Section 32

Male and female descendants of the deceased person’s maternal uncles and aunts, paternal aunts and uterine uncles, and female descendants of his full and consanguine paternal uncles, are governed by the rules applicable to class I of uterine heirs, viz.

(a) Nearer will exclude the remoter in degree.

Explanation:

E.g., if the deceased leaves behind children of a paternal aunt along with grandchildren of a paternal or maternal aunt, paternal aunt’s children will exclude the others.

(b) If the deceased has left behind many heirs of equal degree of nearness each of whom is related to the deceased through a male only, or through a female only, and all are

descendants of agnatic heirs, or of uterine heirs, priority will be determined by the nearness of blood and the estate will be so divided among those entitled that the males get 2/3 and the females 1/3; while if all are male, or female, they will share it equally.

Explanation:

E.g., the deceased has left behind descendants of full and consanguine paternal uncles — all of whom are of the same degree, descendants of agnates and related to the deceased through males. Due to the nearness of blood full paternal uncle's descendants will exclude those of the consanguine paternal uncle. Now if among the claimants there are both males and females, the former will get 2/3 and the latter 1/3; while if ail are male, or female, they will share the estate equally.

Example II: If the deceased has left descendants of full, consanguine and uterine paternal aunts – all of them will be descendants of uterine heirs of equal degree and related to the deceased through a male. The estate will be divided among the full paternal aunt's descendants as in the first Example above, and the descendants of the other aunts will be excluded.

(c) If the deceased has left behind several uterines in an equal degree of nearness of blood related through a male only, or female only, some of whom are descendants of uterine and others of agnatic heirs, the estate will go to the descendants of the agnatic heirs — those of the uterine heirs will be excluded, except if the latter are closer in nearness of blood than the former — in which case they will be entitled to it. Among those entitled, if there are both males and females the estate will be divided in the ratio of 2:1; otherwise they will share it equally.

Explanation:

E.g., the deceased leaves behind a full paternal uncle's daughter and a full paternal aunt's son, the estate will go to the former who is a descendant of an agnate, and the full paternal aunt's son will be excluded since she is a descendant of a uterine heir. If he had left, instead, a consanguine paternal uncle's son, the full paternal aunt's son — though child of a uterine heir — would have got the estate due to stronger blood, excluding the consanguine uncle's daughter.

(d) If among several uterine heirs standing in an equal degree of nearness some are related through a male and the others through a female, without having regard to the kind of blood or descent through agnates, 2/3 of the estate will go to those related through a male and 1/3 to those related through a female; but on each side the said share will be divided as per the strength of blood — equally if all the claimants are male only, or female only, and otherwise divided according to the rule of double share for male.

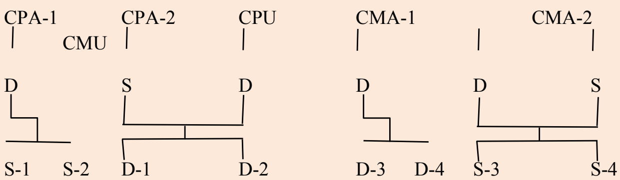
Explanation:

E.g., the deceased has left behind several descendants in the male line of full, consanguine and uterine paternal aunts and several descendants in the female line of a uterine maternal aunt. Here the uterine maternal aunt's descendants will get 1/3 and shall not be excluded by those of full and consanguine paternal aunts; while the remaining 2/3 will go to the surviving uterines related through male (father), on which side descendants of the full paternal aunt will exclude those of the consanguine paternal aunt due to the strength of blood. On each side, then, the entitlement will be divided equally if all claimants are of the same sex, and divided otherwise as per the rule of double share for the male.

(e) Among the descendants of class IV entitled to inherit, the estate will be divided in each generation having regard to the difference of sex among their roots, number of claimants on each side, and single or dual relationship of each claimant with the deceased, as per the details given above in connection with the uterines of class I.

Explanation:

E.g., the deceased has left behind as per the following chart two daughter's sons of a consanguine paternal aunt and two son's daughters of another consanguine paternal aunt, both of whom are also daughters of a consanguine paternal uncle's daughter. He has also left behind two daughter's daughters of one consanguine maternal aunt and two son's sons of another consanguine maternal aunt; both of whom are also sons of a consanguine maternal uncle's daughter, as shown below:



Here the entitlement of CPA-1 , CPA-2 and CPU all of whom are related to the deceased through a male (his father) will be 2/3 — and 1 /3 will be assigned to CMA-1, CMA-2 and CMU all of whom are related to the deceased through a female (his mother). Now on the paternal side each uncle and aunt will count for two due to the number of claimants through them, so as to divide their collective entitlement of 2/3 into eight shares and give 4/8 of this to CPU passing through his daughter to her two daughters D-1 and D-2 in equal shares. The collective entitlement of 4/8 of CPA-1 and CPA-2 will be first divided among their children each of them being counted as two due to the number of claimants through them. Thus, the said 4/8 will be divided into six shares, 2/6 of which will go to the daughter of

CPA-1, and 4/6 to the son of CPA-2. Then, the share of each of them will be dived equally among their respective children so that S-1 and S-2 get 1/6 each and D-1 and D-2, 2/6 each.

Chapter5: Miscellaneous Rules

Section 33

If a person dies leaving behind among his heirs a pregnant wife and delivery is expected in less than a month, the estate will be divided after the delivery.

Section 34

As regards a missing person nothing is known about whose life or death, after the qazi rules on the basis of a strong possibility that he be regarded as dead, his estate will be distributed among those who are his heirs on the date of the qazi's decision.

Section 35

If a person dies leaving among his heirs such a missing person and as per rules the latter if alive would have wholly excluded some other heirs, the former's estate shall not be divided till the latter returns or is pronounced dead. If he returns he will get his share; and where the qazi pronounces him dead the estate will be distributed among the other heirs.

Section 36

If the missing person would have only partially excluded some other heirs, the estate of the deceased will be distributed on his death among all his heirs including him, and his share will be reserved till he returns or is pronounced dead. In the latter case it will be distributed among the other heirs in the proportion of their prescribed shares.

Section 37

If a husband and wife are separated after li'an, the child causing li'an and separation will inherit from its mother and her relatives but not from the man and his relatives, and vice versa.

Section 38

If among the heirs there is a hermaphrodite, she will get a woman's share.

Explanation:

A hermaphrodite is a double-sexed person having equal features of male and female sex or having neither. [Full details to identify such a person may be seen in the original Urdu version of this Compendium.]

Section 39

If among the heirs of a deceased an adult heir forgoes his share for a fixed return, to which other adult heirs of the deceased agree, this is lawful and is technically called takharuj (exclusion by mutual consent).

Section 40

The rules for various cases of takharuj are as under:

(a) If the estate includes only goods and land, etc., but not silver, gold or money, takharuj will be valid irrespective of whether the return is more or less than the due share.

(b) If the estate contains only gold and silver and the fixed return is in gold only or silver only, the return must be higher than the due share and taken possession of on the occasion of making the agreement to that effect.

(c) If the estate includes lands, goods, gold and silver, etc., and the fixed return is something other than gold and silver, whatever be its value the takharuj will be valid. But if the return is in the form of gold or silver, it must exceed the forgoing person's legal share in the gold or silver included in the estate, and must be taken possession of on the occasion of making the agreement to that effect.

Explanation:

Takharuj is in fact a sale in which an heir gives his share to others for a return and is, therefore, governed by the rules of the agreements on barter — in which parity is necessary in things of the same kind but not in those of different kinds; and in agreements for money (including gold or silver), the condition of delivery of possession has to be fulfilled.

Section 41

It is lawful to fix up as return in takharuj some specific item of the estate, and in that case all the heirs must be adult and agreeable to it. The remaining estate will be divided among the other heirs as per their legal shares.

Section 42

It is also lawful to fix up as return for takharuj something which is not a part of the estate, and in that case the return will be distributed among those heirs who have contributed to the return — in the proportion of their respective contributions.

Explanation:

E.g., Zaid tells his brothers Khalid, Amr and Bakr that they should give him a particular thing and can divide amongst themselves his share in the estate. Khalid does not agree, while Amr and Bakr contribute to provide the said thing to Zaid. This is lawful and Zaid's

share in the estate will be divided among Amr and Bakr only in proportion to their respective contributions.

Section 43

An heir who is himself excluded by another heir can also reduce or annihilate the share of some/other heir; but one who is excluded due to a bar on inheritance, e.g., the disqualification of being a killer or of difference of religion, shall not reduce or annihilate any other heir's share.

Explanation:

(a) If the deceased has left behind his father, mother and two brothers or sisters, the brothers or sisters will be excluded by the father but they will reduce the mother's share from 1/3 to 1/6.

(b) If the deceased has left behind his father, father's mother and mother's mother's mother, the father will exclude his mother who will in turn exclude the mother's mother's mother.

(c) If the deceased has left behind a son who has killed him, or a non-Muslim son and a Muslim brother, the killer or the non-Muslim son shall not exclude the others, and so in the latter case the estate will go to the Muslim brother of the deceased.

PART VI: LAW OF WAQFS

Chapter 1: General Principles

DEFINITION OF WAQF

Section 1

Waqf means taking something out of one's ownership and passing it on to God's ownership dedicating its usufruct — without regard to indigence or affluence, perpetually and with the intention of obtaining Divine pleasure — for persons and individuals, or for institutions or mosques and graveyards, or for other charitable purposes.

TERMINOLOGY OF WAQF

(a) The person dedicating something as waqf is called the waqif (dedicator).

(b) Those in whose favour a waqf is made, whether mosques or mausoleums, schools, institutions or organizations, are called mauquf 'alaih (beneficiaries).

(c) The writing through which a waqf is made and its details are made known is called the waqf-nama.

(d) The person appointed to implement the purposes of the waqf and act on the waqif's directions is called the mutawalli (trustee).

CONDITIONS FOR WAQF

Section 2

The following are the conditions for the validity of a waqf:

(a) The waqif must be sane, adult and owner of the thing dedicated.

(b) The object of the waqf should be spiritually rewarding in itself and as per the waqif's beliefs.

(c) The waqf must take effect immediately and should not be made contingent on something.

(d) The waqf must be perpetual.

(e) The thing dedicated should be known.

Explanation:
It is lawful for a person to dedicate such immovable property benefiting from which is lawful under the Shari'at, or such movable property making waqf of which is customary, for a mosque, school, religious or welfare institution, or for other charitable objects. If such a thing is dedicated giving which as waqf is not spiritually rewarding, or if the waqif does not regard it as spiritually rewarding, the waqf will not be valid.

(f) If a waqif uses such words which do not indicate giving an immediate effect to a waqf, the waqf will not be valid.

(g) If the waqif has expressly or impliedly described the waqf as perpetual, or has not negatived its perpetuity, in both the cases the waqf will be valid and perpetual.

Section 3
It is lawful to dedicate all kinds of immovable property.

Section 4
Only those movable properties can be dedicated giving which as waqf is customary.

Explanation:
E.g., for mosques, schools and libraries copies of the Qur'an, books, jugs, clocks, prayer-mats and electric fans, etc. can be dedicated.

Section 5
Things connected to the dedicated property but not perpetually will not be included in the waqf unless it is so specified. If these are permanently connected to the dedicated property or are associated with it or with the objects of the waqf, they will be included in the waqf even without such specification.

Section 6
The beneficiaries (for whom the waqf has been made) shall benefit from the income or the usufruct of the

dedicated property keeping the corpus in tact; and those dedicated things benefiting from which while keeping the corpus intact is not possible will be invested so as to generate income or usufruct to be so benefitted from.

Explanation:
E.g., since it is possible to benefit from lands, houses, books, etc., keeping the corpus intact, these will be so used; but since gold, silver and money cannot be benefitted from while keeping them intact, these will be invested in business and the resulting profit will be benefitted from.

Section 7

It is not lawful to sell or mortgage the waqf property, or to pledge it for obtaining something else, or to lend it.

Explanation:

As the dedicated thing goes out of the waqif's ownership and no one else becomes its owner, it is not basically lawful for any person to have any proprietary dealings with it like sale, disposition for return, gift, lease or mortgage, etc.; and any such action will be void.

Section 8

If something is dedicated for direct use by the beneficiaries and no mutawalli is appointed for it, the beneficiaries will be liable for its care, repair and protection. If the dedicated property is in the need of construction or repair and it is not undertaken by the beneficiaries, the qazi will have the authority to take possession of the dedicated property and return it to the beneficiaries after necessary construction and repair.

Section 9

If a thing was dedicated for direct use by the beneficiaries and has now become useless, it is lawful, with the permission of a God-fearing qazi, to exchange it with some other similar property, or to sell it for money to be used for buying some other similar property. The property so acquired will be treated as waqf in place of the original one. If the waqif had put a condition that the income of the dedicated property shall be spent on the beneficiaries and the said property has become useless, it is also lawful to exchange it with a less expensive and more beneficial property of a different kind, or to sell it for money to be used to buy property of a different kind. The property so acquired will also be waqf in place of the original one.

Section 10

If the dedicated property is endangered, other uses of the waqf will be suspended temporarily and its income used to preserve it. If the existence of the dedicated property is not endangered but it requires only repairs, the mutawalli and the qazi will have the authority to decide what is more necessary between spending on the objects of the waqf property or on its repair.

Section 11

The position of conditions for a waqf is that of the prescribed texts and, therefore, the waqf shall be benefitted from and managed in accordance with the waqif s conditions. However, the qazi may, for lawful reasons, effect such changes in its management and uses which are not repugnant to its objects.

Section 12
It is lawful for the waqif to reserve for himself the benefits of the waqf property, wholly or partly, for his life time.

Section 13
The income of the property acquired out of the income of the waqf shall be spent on the objects of the waqf; and such property can be sold in the interest of the waqf.

Section 14
Once a waqf is complete it cannot be revoked.

Section 15
The waqif cannot revoke a waqf made during death-illness; but if such a waqf exceeds one-third of his estate it will not take effect in the excess.

Section 16
If a bequest for waqf made in death-illness has not been revoked by him during his life time, after his death it will take effect up to one-third of his estate.

Section 17
It is lawful to make a waqf for one's family and relatives, provided that the ultimate benefit is dedicated to spiritually rewarding things (e.g., the poor, mosques and schools).

Chapter 2: The Mutawalli

Section 18
The mutawalli must be a Muslim, sane, adult, trustworthy and capable of managing things.

Section 19
The power of appointing a mutawalli belongs primarily to the waqif, next to his executor, then to the beneficiaries, after them to the knowledgeable and trustworthy inhabitants of the locality, and finally to the qazi.

Section 20
The right to act as the mutawalli primarily belongs to the waqif. If, therefore, a waqif has said nothing specific about the office of the mutawalli he will himself be the mutawalli.

Section 21
The waqif can dismiss a mutawalli appointed by him — unless the qazi has by his order protected his office.

Section 22
The waqif can appoint one or several mutawallis for any duration of his choice. If he has not specified any duration for the assignment it will come to an end with the death of the waqif.

Section 23
The waqif can appoint successive mutawallis to act as such in the order prescribed by him.

Section 24
After the waqif's death his executor will have the right to the management of the waqf property. He may either manage it himself or nominate another person as the mutawalli.

Section 25
If the executor has not appointed a mutawalli to continue to act till after his death, the mutawalli appointed by him will automatically vacate office on his death.

Section 26
If the waqif at the time of his death appoints an executor, while he has already appointed earlier some one else as the mutawalli to act as such till after his death, the executor too will be treated as a mutawalli and will jointly act with the person nominated as the mutawalli, even if the waqif has not specifically said that the executor will be a mutawalli as well.

Section 27
If there are two mutawallis of a waqf, either of them cannot lawfully deal with the waqf without the consent of the other.

Section 28
The qazi will appoint the mutawalli in the following cases, viz. — if the waqif is alive but neither takes any interest in the management of the waqf nor nominates a mutawalli; or if the waqif is dead but has not nominated a mutawalli, nor is there any executor of the waqif or of his executor.

Section 29
It is obligatory for the qazi to dismiss an incapable mutawalli, or the one who has committed breach of trust, even if he was appointed by the waqif himself.

Section 30
A mutawalli appointed by the waqif or his executor cannot be dismissed by the qazi without a reason recognized by the Shari'at; but he can dismiss one appointed by a qazi.

Section 31
The mutawalli shall be liable to present the accounts of the waqf on demand to the waqif, or to the beneficiaries, or to the knowledgeable and trustworthy inhabitants of the locality, or to the qazi.

Section 32
The waqif or his successor, or the qazi, can fix a remuneration for the mutawalli.

Section 33
It there is no formal waqf-deed relating to a mosque, or it the waqf-deed does not specify the mutawallis and their order of succession, those who offer prayers in that mosque will have a right to appoint the mutawalli.

Section 34
A mutawalli cannot borrow money except in the interest of the waqf; if he borrows money even though not required in the interest of the waqf, he will be personally liable to repay it.

Section 35
If the waqif has fixed a duration for which the waqf property, whether it be a house or a land, can be rented out the mutawalli will adhere to the same.

Section 36
If the waqif has not fixed any such duration, the dedicated property cannot be rented out for more than one year.

Section 37
If the land dedicated, or its crop, be of such a nature that the lessee cannot fully benefit from it in one year, or if it takes about one year to make the land fertile, in such a condition it can be leased, — with the consent of the qazi — for not more than three years.

Section 38
In special circumstances where limiting the tenancy to one year or three years may yield no or less rent to the prejudice of the waqf, with the consent of the qazi the lease may be extended for a duration which does not cause risk of usurpation or adverse possession of the waqf property.

Section 39
If the tenancy arrangement becomes void or violable for some reason, while the tenant has already benefitted from the waqf property or kept it in his possession, he will have to pay a proper rent (prevalent rent) for as many days for which he has benefitted from it or kept

it in his possession. Similarly, if a person usurps the waqf property and either benefits from or keeps it in his illegal possession, it will be obligatory for him to pay a proper rent for as many days for which he benefitted from it or kept it in his possession.

Section 40

In order to prevent a claim for adverse possession or the risk of Illegal possession, the tenant must not be allowed to build personal premises on the waqf land; and if the mutawalli allows him to do so, or the tenant does so on his own, and the duration of the tenancy ends, the mutawalli is not obliged to retain him as the tenant even if he is willing to pay the prevalent rent and even if there is no risk of illegal possession by him. If there is such a risk, or if he is not willing to pay the prevalent rent, it is obligatory for the mutawalli not to retain him as the tenant.

The mutawalli should also, if there is no danger to the waqf land, compel such a tenant to complete the construction. If this may endanger the waqf land, the mutawalli should compel the tenant to sell the debris to the waqf or, where the waqf has no money for it, to a person from whom there is no risk of usurpation of waqf. As long as none of these is possible, he should rent out the land including the built-up portion to some other person until the built-up portion gets demolished and its debris reaches the owner. The rent received during this period will be distributed among the owner of the building and the waqf in proportion of their respective shares.

Section 41

If on the waqf land the lessee's crop is standing and the tenancy expires, the lease will be extended till the crop is reaped, and the lessee will have to pay a proper rent.

Section 42

If before the fixed duration of tenancy expires the proper rent goes up, the mutawalli will have a right to pre-mature termination of the transaction.

Section 43

It is obligatory for the mutawalli to rent out the waqf property on a proper rent only; and if he has made any considerable reduction in the rent the tenant will still be liable to pay the proper rent.

Chapter 3: Miscellaneous Rules

Section 44

For a land to become a mosque in the eyes of the Shari'at, in addition to the other conditions for the validity of waqfs it is further necessary that the waqif should by partition make it so separate and distinct from things owned by him or any other person that no right relating

to it remains with him or the said other person. Thus, if a person dedicates as mosque a land which is jointly owned by him and another person, it will not become a mosque.

Section 45

For a land to become a mosque, it is not necessary that the way to it should be specifically taken out of one's ownership and made exclusive for the mosque. The way to the mosque will automatically become a waqf as an easement of the mosque and the waqif's ownership in it will abate.

Section 46

The qazi has the authority to appoint a nazir (observer) over the mutawalli. If the nazir has been appointed on the ground of breach of trust, the mutawalli will be no more free to act; otherwise he can continue to act freely.

Section 47

On principle, it is for the mutawalli to claim that a particular thing is a waqf — but if some one else so claims the claim shall be entertained.

Section 48

If a person first sells some property and then claims it to be a waqf, the claim will be entertained due to the contradiction. Evidence proving that it is a waqf will be admissible and it will be proper to decide on the basis of the said evidence that it is waqf property, in which case the sale will be regarded as void.

Section 49

Where a person claims the right to be the beneficiary of a waqf property but for some reason his claim is rejected, if evidence as per the Shari'at is tendered to prove it to be a waqf it will still be lawful to declare it to be a waqf.

Section 50

If a person makes a waqf the use of which for both the indigent and the affluent is customary, e.g., a mosque, a travellers' rest-house or a hospital, all of them can benefit from it.

Section 51

If the objects of a waqf specified by the waqif are initially non-existing, or become non-existent later, as long as they do not exist the income of the waqf will be spent on the poor.

Section 52

If a thing has been adjudicated to be a waqf but the beneficiaries' claim to it is rejected, the poor will be the object of such a waqf as well.

Section 53

If evidence is to be tendered in respect of waqfs or their objects, in order to be admissible there must be at least two religious-minded male, or a male and two female, witnesses.

Section 54

As regards such old waqfs eye-witnesses of whose creation cannot be expected to be alive, for the proof of their being a waqf, or of their objects or the extent of their various objects, evidence based on reliable information will also be admissible. Similarly, dependable documents too will be enough for the decision of the said matters. If there be no documents either, a decision about the objects can be taken having regard to the conduct of the mutawallis in the past.

Explanation:

'Evidence based on reliable information' means that the witnesses should have heard it (what they are testifying to) from such number of persons which makes it impossible that so many persons will be habitually telling a lie; or each witness should have, after hearing it from two just male or a just male and two just women, given evidence in the qazi's court that a particular property is waqf, or that these are the objects of a waqf. If it be to, the evidence will be regarded as, 'evidence based on reliable information' — also known in the terminology of Islamic jurisprudence as "evidence based on corroborative hearing" or "evidence based on reputation".

Section 55

If the issue of such a thing being waqf goes to the court and in view of the date of making the waqf as stated by the claimant there be a strong possibility that eye-witnesses may be alive, for the proof of such a waqf or of its objects or the extent of various objects evidence of eye-witnesses will be necessary. If for some reason the eye-witnesses cannot appear in the court, the evidence of such persons will be enough in whose presence the eye-witnesses may have given evidence and whom the eye-witnesses might have deputed to give evidence in that regard.

Explanation:

In the terminology of Islamic jurisprudence bearing witness to an evidence is called shahadat 'ala al-shahadat (evidence of evidence). In case the real witnesses cannot appear in the court for some reason, each such witness – man or woman — should give evidence in the presence of at least two men or a man and two women and ask them to appear in the court to bear witness to his or her evidence, and accordingly the witness so appointed may appear in the court and say "I witness that so and so has made me witness to such and such thing and asked me to bear witness to his evidence".

The AIMPLB

The All India Muslim Personal Law Board [AIMPLB] was set up in 1972 at a grand Shari'at Convention held at Bombay. It is a representative body of the Muslims of India working for the protection of Islamic law as in force in India under the banner of the ‘Muslim Personal Law’. All sections of the Indian Muslim community are represented on the Board. The Board has now its headquarters at New Delhi.

The Compendium

This Compendium of Islamic Laws offers a section-wise compilation of the rules of Shari'at relating to the areas governed in India for the Muslims by the Muslim personal law. The original Urdu version of the Compendium was prepared by the 'ulama under the auspices of the AIMPLB. It was finalised under the supervision of the present President of the AIMPLB, Maulana Qazi Mujahid-ul-Islam Qasimi. The Compendium has been translated into English for the AIMPLB by Professor Syed Tahir Mahmood.

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